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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1483

UNITED STATES STEEL CORPORATION,
Petitioner,

v.

JIMMIE L. RODGERS and JOHN A. TURNER,
Respondents,

HONORABLE HUBERT I. TEITELBAUM,
United States District Judge,
Nominal Respondent,

LOCAL 1397, AFL-CIO UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Nominal Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United States Steel Corporation, Petitioner herein, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this Case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. The slip opinion of the Court of Appeals is reproduced in the Appendix. (App. A, *infra*, as corrected by App. C, *infra*). The Writ of Mandamus and/or Prohibition issued by the Court of Appeals to the District Court is reproduced in the Appendix. (App. B, *infra*). The orders of the District Court are not officially reported. The transcript of the District Court proceedings of September 29, 1973 (App. D, *infra*) took the place of an order of court. The transcript of the District Court proceedings of July 19, 19[illegible] (App. F, *infra*) also took the place of written orders of court although the District Court subsequently embodied them in a written order on September 12, 1974. (App. G, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1975. United States Steel Corporation's timely petition for rehearing was denied by the Court of Appeals on February 26, 1975. A timely Petition for Writ of Certiorari may be filed by Petitioner with this Court on or before May 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

This case involves the interpretation and application of 28 U.S.C. §2071, Federal Rules of Civil Procedure 23 and 83, and Local Rule 34(d) of the United States District Court for the Western District of Pennsylvania. They are printed in Appendix H, *infra*, pp. 78a-79a.

QUESTION PRESENTED

The District Court for the Western District of Pennsylvania has adopted Local Rule 34(d), supplementing Rule 23 of the Federal Rules of Civil Procedure, which provides that no communication concerning a case sought to be maintained as a class action may be made by any of the parties or their counsel with any potential or actual class member who is not a formal party to the action without the prior approval of the Court.

The question presented is whether the District Court lacked the statutory power to adopt Local Rule 34(d) and to enforce that rule prior to the class action determination.

STATEMENT OF THE CASE

This action was filed, on August 24, 1971, by the two named Plaintiffs (Respondents herein) as an alleged class action under Fed. R. Civ. P. 23. The Complaint alleges violation of Title VII of the Civil Rights Act of 1964[1] and the Civil Rights Act of 1870[2] by Defendant United States Steel Corporation ("USS") (Petitioner herein) and Defendants United Steelworkers of America and Local 1397 of the United Steelworkers of America ("Defendant Unions") at the Homestead Works of USS.

No class determination has yet been made and USS contends that the purely individual claims of Plaintiffs Rodgers and Turner are not appropriate for class action status.[3]

Discovery was not commenced until November 20, 1972, some fifteen months after the institution of this action.

On September 21, 1973, the Plaintiffs requested that the District Court generally suspend the application of Local Rule 34(d) as to Plaintiffs and their attorneys, so that they would be free to make unsupervised contacts and communications with potential members of the alleged plaintiff class. From the start of this suit, all parties and their counsel had been restricted by Local Rule 34(d) from communicating with potential mem-

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1. 42 U.S.C. §2000e, 78 Stat. 253.

2. 42 U.S.C. §1981, 16 Stat. 144.

3. Petitioner's Motions for Summary Judgment against each Plaintiff were filed in the District Court on September 27, 1973, and have been held in abeyance pending completion of discovery by Plaintiffs. (App. D, *infra*, pp. 36a-37a).

bers of the alleged class unless such communications were approved by the District Court.[4]

The alleged reason for requesting suspension of Local Rule 34(d) as to Plaintiffs was their purported need to engage in communications with potential members of the alleged class for "discovery" purposes. (App. D, *infra*, p. 38a). In its September 29, 1973, ruling upon Plaintiffs' request, the District Court first noted that Plaintiffs had not even utilized the great bulk of "discovery" materials made available by USS regarding the various matters, such as "testing practices", as to which Plaintiffs supposedly desired to contact potential members of the alleged class.[5] The District Court then stated that it would allow Plaintiffs to contact potential class members for appropriate discovery purposes but required that Plaintiffs should advise the Court, before contacting alleged class members, of the purpose for the contact as well as the identity of the potential members of the alleged class they wished to contact. The District Court indicated that, if Defendants raised objection regarding a particular communication, a hearing would be held. (App. D, *infra*, pp. 40a-41a). The Plaintiffs never provided such a statement to the District Court. Plaintiffs did not seek appellate review of that District Court ruling at that time. However, the September 29, 1973,

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4. The United States District Court for the Western District of Pennsylvania adopted this rule, now numbered 34(d), on June 15, 1971, prior to the commencement of this action.

5. Although these documents had taken USS over 2,000 hours to assemble for Plaintiffs' review, in the six months they had been available prior to September 29, 1973, Plaintiffs had inspected them for only two hours. (App. D, *infra*, pp. 38a-39a).

ruling of the District Court was attacked in Plaintiffs' "Petition for Writ of Mandamus and/or Prohibition" filed on August 12, 1974.

On April 12, 1974, a Consent Decree was entered by Chief Judge Sam C. Pointer, Jr., in *United States v. Allegheny-Ludlum Indus., Inc.*, — F. Supp. — (N.D. Ala., Civ. Action No. 74-P-339-S). This Decree was the result of extensive negotiations between the United States Government, the basic steel industry and the United Steelworkers of America. The Consent Decree required, and USS and the Defendant Unions implemented (effective August 4, 1974, at the Homestead Works) the final systemic injunctive relief Plaintiffs had sought in this action. The Decree also provides for the payment of backpay to certain black, female, and Spanish-surnamed employees. In addition, this Decree requires USS and the Defendant Unions to make certain specific types of communications explaining the Decree to all employees, including the potential class members in this action. Under the Decree, communications to employees by USS and the Defendant Unions are carefully monitored by the United States Government and must be submitted for review to Judge Pointer, as well as to judges who have private actions pending, including Judge Teitelbaum of the Western District of Pennsylvania, prior to dissemination to employees.

On April 17, 1974, Plaintiffs filed a motion with Judge Teitelbaum invoking Local Rule 34(d), wherein Plaintiffs requested that USS and the Defendant Unions be prohibited from making any communications, pursuant to the Consent Decree litigation, to potential members of the alleged class in the instant case, absent the prior approval of those communications by the District

Court. USS and Defendant Unions stipulated that they would submit the communications in question to Plaintiffs and to the District Court prior to making such communications pursuant to the Consent Decree.

On June 26, 1974, Plaintiffs filed motions requesting permission to make the following communications:

1. Address a mass meeting at the Homestead, Pennsylvania, chapter of the N.A.A.C.P., which admittedly would be attended by members of the alleged class, for the alleged purpose of discussing the instant lawsuit as well as the Consent Decree;

2. Communicate with six class members who allegedly had made an unsolicited contact with counsel for Plaintiffs;

3. Generally suspend application of Local Rule 34(d) as to Plaintiffs so as to permit them to engage in any communication they desired with potential members of the alleged class.

The District Court promptly ruled upon those requests as follows:

1. The District Court held that it did not view Plaintiffs' request for permission to address a mass meeting as being appropriate at that time, although the Court indicated that it would consider a renewal of that request at a more appropriate time. (App. F, *infra*, p. 61a; App. G, *infra*, pp. 76a-77a);

2. The District Court granted the request to communicate with the six specified individuals, if affidavits were filed verifying Plaintiffs' coun-

sel's representation that those contacts had been unsolicited. (App. F, *infra*, pp. 61a-65a; App. G, *infra*, pp. 76a-77a);

3. The District Court denied Plaintiffs' request for general suspension of Local Rule 34(d) as to Plaintiffs, although the District Court stated, in its response to the request to communicate with the six specified individuals, that Plaintiffs could communicate with any class members who made an unsolicited contact with Plaintiffs' attorneys, after an appropriate affidavit was filed. (App. F, *infra*, pp. 61a-65a; App. G, *infra*, pp. 76a-77a).

Plaintiffs then sought reversal of the District Court's July, 1974, rulings on these three communications requests,[6] as well as the September 29, 1973, ruling, and also sought to have Local Rule 34(d) set aside completely, by applying for a Writ of Mandamus and/or Prohibition from the Court of Appeals. In the application for that Writ and in their subsequent briefs, the only basis Plaintiffs advanced for setting aside Local Rule 34(d) was their claim that it violated the First Amendment to the United States Constitution.

The majority opinion of the Court of Appeals, written by Judge Gibbons and joined in by Judge Kalodner, explicitly avoided ruling upon whether Local Rule 34(d) violated the First Amendment.

Instead, the majority opinion invalidated Local Rule 34(d) upon the basis of "statutory interpretation," a

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6. Two other discovery-related rulings which were affirmed by the Court of Appeals are not relevant to this Petition. (App. A, *infra*, pp. 15a-21a).

basis which was never argued or briefed by any of the parties. The opinion first held that the "only statutory sources of district court rule-making power are Rule 83, Fed. R. Civ. P. and 28 U.S.C. §2071." (App. A, *infra*, p. 23a). Notwithstanding the broad language of §2071 and Rule 83—which on their face do not exclude such power—the majority, without citation to legislative history or prior decision, held that Congress never intended to allow regulation by district courts of communications between plaintiffs or their attorneys with potential class members. The majority opinion holds as follows:

> "Rather than decide that constitutional issue [overbreadth], however, we can dispose of this case by way of a statutory interpretation. We conclude that Congress never intended Rule 83 or §2071 to empower the district courts, as was attempted in Local Rule 34(d) to require prior judicial approval of communications between plaintiffs, or their attorneys, and third parties, when such communications seek to encourage common participation in a lawsuit. Thus, Local Rule 34(d) as presently drawn was outside the power granted to the district court and its enforcement may be prevented by this court pursuant to §1651." (App. A, *infra*, p. 25a).

The majority opinion acknowledged that district courts have "undoubted power"[7] to impose some restrictions on First Amendment rights of communication after the suit has been certified as a class action. The majority concluded, however, without citation of any authority, that such power does not exist prior to a class

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7. App. A, *infra*, p. 22a.

determination but springs into being only after a class has been certified by the district court:

> "[T]he justification urged for the Local Rule varies in the separate contexts. Once a favorable class action determination has been made, the justification for the Ruie is said to flow from the court's power, and even duty, to prevent the Rule 23 procedural device from being misused by communications which are false or misleading." (App. A, *infra*, p. 22a).

On this basis, the Court of Appeals issued a Writ of Mandamus and/or Prohibition reversing the District Court and directing that it vacate the various orders which had been entered by that court for the purpose of regulating communications with potential members of the alleged plaintiff class.[8]

Based upon that same theory, *i.e.*, that district courts lack all power to regulate communications with the potential plaintiff class, the Writ of Mandamus and/or Prohibition issued to the District Court by the Court of Appeals also prohibits the District Court from further enforcing Local Rule 34(d) in this case. This prohibition is not limited to the pre-certification stage of the proceedings. (App. B, *infra*, p. 33a).

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8. The Writ ordered the District Court to vacate the "orders of July 19, 1974 and September 12, 1974 insofar as they restrict communications with potential members of the class by the plaintiffs or their attorneys." (App. B, *infra*, p. 33a). It was, in fact, Local Rule 34(d) which effected such restrictions except to the extent that approval was granted by the District Court.

Circuit Judge Weis entered a separate opinion in which he specifically disagreed with the majority's conclusion that district courts lack power to regulate communications with potential members of the alleged plaintiff class, although Judge Weis found Local Rule 34(d) to be somewhat overbroad.[9]

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9. The distinction between the majority opinion and the concurring opinion is an important one for the reasons discussed *infra* at 16.

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals Has Erroneously Decided A Question Important To All Class Action Litigants.

The instant case is an important one to all class action litigants and to the federal courts because it involves the extent to which the federal courts can regulate communications with potential members of an alleged plaintiff class. In this case, a majority opinion of the Third Circuit has invalidated Local Rule 34(d), a rule providing for court supervision of communication with potential members of the alleged plaintiff class, on the grounds that the federal courts lack any statutory power to regulate such communication in the pre-certification stage of an alleged class action.

Since Local Rule 34(d) was based upon the recommendations and model rules proposed by the MANUAL FOR COMPLEX LITIGATION[10] and since the Third Circuit's opinion precludes any regulation by district courts of communication by plaintiffs or their attorneys with potential members of an alleged plaintiff class, the majority's opinion has implications and importance which reach far beyond the facts of the instant case.[11]

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10. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (1973). The MANUAL FOR COMPLEX LITIGATION has been reproduced in CCH TRADE REGULATION REPORTS, MANUAL FOR COMPLEX LITIGATION (1973) and in 1 J. MOORE, FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION (1973, Part 2).

11. The importance of decisions which relate to the administration of class actions has been recognized by this Court. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974).

Reasons for Granting the Writ.

The majority's opinion strikes down Local Rule 34(d) through a circuitous process of reasoning.

In the first step of its reasoning process, the majority divides the operation of the Local Rule into two separate contexts, *i.e.*, the period prior to certification of an action as a class action and the period subsequent to that certification. (App. A, *infra*, pp. 21a-22a). The majority then comments that the justification for the Local Rule would vary in those two contexts. The majority states that justification for the Local Rule in the post-certification phase "is said to flow from the court's power, and even duty, to prevent the Rule 23 procedural device from being misused by communications which are false or misleading." (App. A, *infra*, p. 22a).

The majority's distinction between the justification for the Local Rule in the post-certification, as opposed to the pre-certification phase, is frankly incomprehensible. Surely the dangers of abuse of Rule 23 are as great, if not greater, in the pre-certification phase of a lawsuit.[12] One cannot help but think that the Third Circuit's distinction is merely an attempt to distinguish away the obvious grant of power in Rule 23(d)[13] to regulate communications. Since no explanation is offered by the majority as to why Rule 23 power to regulate communications should not exist in the pre-certification phase, we submit that the Third Circuit's division of the operation of the rule into the pre-certification phase and the post-certification phase is a pretext which should be rejected and that a court's Rule 23(d) power to regulate communications should be as appli-

12. Petition, *infra*, at 16-17.

13. Petition, *infra*, at 18.

cable to the pre-certification phase as to the post-certification phase.

In the next step of its reasoning process, the majority explicitly disclaimed ruling upon whether the First Amendment to the United States Constitution prohibits any portion of Rule 34(d). (App. A., *infra*, p. 23a). The constitutionality of Local Rule 34(d) was the sole basis of Plaintiffs' appeal to the Third Circuit and the subject of the briefs and arguments of the parties in the District Court and the Court of Appeals.

The majority, instead, struck down Local Rule 34(d), in its entirety, upon the basis of "statutory interpretation", a basis which was never briefed or argued in either the District Court or the Court of Appeals. This process of "statutory interpretation", discussed in detail *supra* at 9-11, was, itself, curious. Ultimately, the majority took 28 U.S.C. §2071 and Fed. R. Civ. P. 83 —both of which convey to the district courts very broad powers—and narrowed them by merely asserting that they do not include the power to regulate plaintiffs' communications with potential members of an alleged class.[14]

When one considers that the majority opinion has drawn a distinction between a court's power to regulate communication in the pre-class certification period, as opposed to the post-certification phase of the suit, and also that the majority opinion has interpreted "congressional intent" without reference to any legislative history or statutory citation and without the urging or briefing of any of the parties, one can only conclude that

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14. App. A, *infra*, p. 25a.

the majority has deliberately and without justification avoided the First Amendment issues which it found to be difficult.

However, the communications issues involved in this case are important and should not be avoided. Defendants, plaintiffs, and judges, alike, need the guidance of this Court as to the extent, if any, to which courts may supervise class action communications. Even if Local Rule 34(d) were eventually determined to be to some extent invalid, the basis upon which that determination is made is important. If Local Rule 34(d) were merely held to be to some degree unconstitutionally overbroad, as Judge Weis suggested, then the district courts could appropriately tailor rules or *ad hoc* pretrial orders to eliminate any possible overbreadth.[15] However, the majority opinion's determination, based upon "statutory interpretation", strikes down all regulation of communications by plaintiffs, or their attorneys, with potential members of the alleged plaintiff class.

Under the majority's opinion, plaintiff attorneys, who have acquired that status merely by the filing of a federal court complaint, can engage in numerous abuses of the class action process which were heretofore prevented by court supervision of communications. Those attorneys can now solicit participation in the class action, misrepresent their own status as well as the status and nature of the action, and otherwise contact or enter into fee or other arrangements with per-

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15. Although the Third Circuit never considered the matter because it held any restrictions to be beyond the statutory powers of the district courts, it is probable that the specific rulings by the District Court, in response to the particular requests of Plaintiffs, avoided any problems of constitutional "overbreadth".

sons who are not formal parties to the action.[16] These alleged class members are, of course, persons with whom plaintiff attorneys would have had no contact absent the procedural devices created by Fed. R. Civ. P. 23.

In order to give adequate guidance to courts and litigants, especially those within the jurisdiction of the Third Circuit, this Court should grant this Petition for a Writ of Certiorari to review these issues which are applicable to virtually all suits sought to be maintained as class actions under Fed. R. Civ. P. 23.

2. The Court of Appeal's Decision Is In Conflict With Numerous Decisions Which Have Utilized Rule 23 To Regulate Communications In Class Actions, Available Evidence Of Congressional Intent, And The Conclusions Of The Prominent Jurists And Other Legal Scholars Who Drafted The Suggested Rule Upon Which Local Rule 34(d) Was Based.

Not only is the Third Circuit's holding—that district courts lack the statutory power to regulate communications with potential class members—devoid of citation or support, but it also conflicts with a decision of this Court, the language of Fed. R. Civ. P. 23(d) which authorizes appropriate orders "determining the course of proceedings", and the numerous district court decisions which have utilized Rule 23 power to regulate class action communications. The majority opinion is also contrary to that evidence of congressional intent which is available and the conclusions reached by the

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16. As noted by Judge Weis, these are the very abuses that the drafters of the MANUAL FOR COMPLEX LITIGATION believed should be prevented. (App. A, *infra*, p. 29a-30a).

prominent jurists and other legal scholars who prepared the model rule in the MANUAL FOR COMPLEX LITIGATION upon which Local Rule 34(d) was based.

In reaching its decision, the majority held that the only sources of district court rule-making power were Fed. R. Civ. P. 83 and 28 U.S.C. § 2071. (App. A, *infra*, p. 23a). The majority opinion is accordingly incompatible with the decision of this Court in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). In *Link*, 370 U.S. at 629-632, this Court held that federal courts have broad inherent powers to control litigation before them and that those inherent powers were not removed by the promulgation of the Federal Rules of Civil Procedure. For this reason alone, the majority's opinion is in error because it overlooked the inherent powers of district courts to control litigation before them.

The majority opinion also is in conflict with Fed. R. Civ. P. 23, itself.[17] Rule 23(d) provides that the courts have the power to make appropriate orders to regulate the conduct of class actions. The Court may make appropriate orders "determining the course of proceedings", "imposing conditions on the representative parties" and "dealing with similar procedural matters". Fed. R. Civ. P. 23(d)(1), (3), and (5). As discussed *supra* at 10-11, the majority apparently believes that power to supervise communications arises—if ever—only after the certification of an action as a class action.

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17. Curiously, the majority opinion ignored its own finding that, "The Western District of Pennsylvania has adopted Local Rule 34(d) *supplementing* Rule 23 Fed. R. Civ. P. . . . ." (Emphasis added) (App. A, *infra*, p. 6a).

Of course, there is no such indication in Rule 23 that a court's powers arise under that rule only after certification. In addition, as Judge Weis explained in his concurring opinion,[18] experience demonstrates that the class action device may be abused prior to the certification of a class:

> "The potential for harm does not spring into being instanter upon the certification of a class action but exists before that time. *Carlisle v. LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972); *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972), *Stavrides v. Mellon National Bank & Trust Co.*, 60 F.R.D. 634 (W.D. Pa. 1973). To limit the effect of a rule to conditions existing after certification would be to unduly limit the ability of the court to cope with the problems." (App. A, *infra*, p. 30a).

Judge Weis' rejection of the majority's approach is supported by an opinion in the Eastern District of New York, which also rejected the argument that it could not regulate communications with the potential class, by reason of the fact that the case was still in the pre-certification stage, as follows:

> "The court declines to adopt any rule that would undercut the authority conveyed by rule 23(d). It would be a strange rule, indeed, where a court would be powerless to deal with what it considered

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18. Judge Weis would have held that, while Local Rule 34(d) should be somewhat narrowed to avoid overbreadth, the district courts do not lack all power to regulate plaintiffs' communications with potential class members in the pre-certification period. (App. A, *infra*, p. 31a).

abuses because the litigation had not reached a certain stage. To adopt such a rule would be little more than inviting counsel to engage in a race to complete questionable practices before the court acquires power to prevent such abuses. For the purpose of preventing and correcting abuses, once an action is filed as a class action it should be so presumed even prior to a formal determination that it is a class action. Torres v. New York State Dep't of Labor, 318 F Supp 1313 (SDNY 1970)." *Weight Watchers of Philadelphia v. Weight Watchers International*, 53 F.R.D. 647, at 651 (E.D. N.Y. 1971).

There is an implication in the Third Circuit's opinion that, rather than authorizing regulation of communications with potential class members, Rule 23 somehow limits the courts' powers by reason of the fact that Rule 23 authorizes "common participation in a law suit." (App. A, *infra*, p. 25a). The mere fact that Rule 23 authorizes "common participation"—assuming the criteria of Rule 23 are met—should not obliterate all district court power to regulate communications between plaintiffs and potential class members.

Indeed, the Third Circuit's opinion is in direct conflict with the numerous decisions which have acknowledged district court power to regulate communications by plaintiffs or their attorneys with potential members of the putative plaintiff class.[19]

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19. The following reported cases acknowledge the power of the district court to regulate communications between plaintiffs' attorneys and members of the plaintiff class. *Vance v. Fashion Two Twenty, Inc.*, 16 F.R. Serv. 2d 1513 (N.D. Ohio 1973); *DiCostanzo v. Chrysler*

The Third Circuit opinion purports to be based upon "congressional intent" to bar district courts from regulating communications between plaintiffs or their attorneys and potential class members. However, not only does the majority opinion fail to cite any congressional authority for this proposition, but it directly conflicts with the available evidence of legislative intent.

A recent Congressional study has reaffirmed that Congress is well aware that the district courts have adopted rules and orders regulating communications with potential class members in the pre-certification stage. SENATE COMM. ON COMMERCE, 93d Cong., 2d Sess., CLASS ACTION STUDY at 13, 16, 22-24 (Comm. Print, June, 1974) ("CLASS ACTION STUDY"). That June, 1974, study of existing practice under Fed. R. Civ. P. 23 based its conclusions on an extensive analysis of the practice in the District Court for the District of Columbia, as well

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Corp., 15 F.R. Serv. 2d 1248 (E.D. Pa. 1972); *Merit Motors, Inc. v. Chrysler Corp.*, 1973-1 CCH Trade Cases ¶74,288 (D.D.C. 1972); *Weight Watchers of Philadelphia v. Weight Watchers Int'l*, 53 F.R.D. 647, 651 (E.D. N.Y. 1971); *Philadelphia Housing Auth. v. America R&S San. Corp.*, 323 F. Supp. 364, 369 (E.D. Pa. 1970); and *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722, 728 (N.D. Cal. 1967). It appears from the opinions that *Vance, DiCostanzo, Merit Motors, Weight Watchers* and *Philadelphia Housing* probably involved regulation of communications prior to certification of a class. Also, *cf. Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972); *Stavrides v. Mellon Nat. Bank & Trust Co.*, 60 F.R.D. 634 (W.D. Pa. 1973). *Cf Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970), *cert. denied* 398 U.S. 950 (1970) (holding that, for purposes of administering Rule 23, in the context of dismissal or compromise, suit was to be treated as a class action even prior to certification of a class).

as on a more generalized survey of the practices throughout the nation. CLASS ACTION STUDY at 3. In discussing the danger that plaintiffs' attorneys might engage in solicitation to increase the size of the potential class, the potential recovery, and their attorneys fees, the STUDY noted two means of controlling this abuse, *i.e.*, scrutinizing the attorneys fees and regulating communications. The STUDY stated:

> "Critics of class actions charge that plaintiffs' attorneys frequently abuse the class action device by engaging in solicitation to create a class and by using it primarily as a vehicle to collect exorbitant fees. . . .
>
> * * *
>
> "Defendants' attorneys expressed concern that plaintiffs' attorneys initiated communication with potential class members once suits were filed, and indicated that they *frequently filed motions for protective orders to prevent such communication without court approval.* One attorney even indicated that he would file such motions as a matter of course in any class action. On the other hand, plaintiffs' attorneys also complained of unauthorized communication with class members by defendants trying to persuade the class members not to participate in the action. In at least two cases, plaintiffs filed motions for protective orders proscribing this sort of communication.
>
> "The scope of this study is too limited and the present rule 23 too new to generate a great deal of data on court control of fees and solicitation. *It does appear, though, that in the United States District Court for the District of Columbia an effort is*

> ***being made to scrutinize attorneys' fees before approval and to prevent unauthorized attorney communication with the class by issuance of protective orders.*** This seems to be in accord with the general trend of the law concerning the award of attorneys' fees." (Emphasis added; footnotes omitted.) CLASS ACTION STUDY at 22-24.

Thus, as of June, 1974, a Congressional study acknowledged the power and the need for district courts to supervise communications with potential class members. Although the CLASS ACTION STUDY recommended that certain provisions of Rule 23 be changed in regard to consumer class action legislation, that Study recommended no restriction upon the power of the district courts to supervise communications. Accordingly, Petitioner submits that Congressional intent should not be used to narrow the broad rule-making power conveyed to the district courts by 28 U.S.C. § 2071 and Fed. R. Civ. P. 83.

The Third Circuit's holding—that district courts lack all power to regulate communications between plaintiffs or their counsel and potential class members in the stage of the litigation prior to certification of a class—also conflicts with the views of the Co-Ordinating Committee for Multiple Litigation which, under the auspices of the Judicial Conference of the United States and the Federal Judicial Center, drafted the suggested local rules in the MANUAL FOR COMPLEX LITIGATION upon which Local Rule 34(d) was based. The rules suggested in the MANUAL are explicitly designed to apply to all phases of class action litigation—both prior to and

after a class determination.[20] Since the MANUAL's drafters include many prominent jurists and legal scholars,[21] the Third Circuit's determination that district courts have no statutory power to adopt the portion of the suggested rules applicable to the pre-certification stage seems especially ill-conceived.

In addition, the recommendations of the authors of the MANUAL FOR COMPLEX LITIGATION have received approval from the text writers. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §1797 at 226 (1972). *See also* 3B J. MOORE, FEDERAL PRACTICE ¶23.75(5) at 23-1475 (1974).

In order to correct the conflict of this Third Circuit decision with numerous prior decisions, available evidence of Congressional intent, and the conclusions of the textwriters as well as the practitioners, this Court should grant the Petition for Writ of Certiorari.

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20. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION 35-40, 211-12 (1973); 1 J. MOORE, FEDERAL PRACTICE 27-32, 188-89 (1973, Part 2).

21. The MANUAL and the Suggested Local Rules were initially prepared by a drafting subcommittee of the Co-Ordinating Committee for Multiple Litigation chaired by Chief Judge William H. Becker and including Judge George H. Boldt, Chief Judges Thomas J. Clary, Joe Ewing Estes, and Edwin A. Robson; Phil C. Neal, Dean of the University of Chicago Law School and William G. Levi. In addition, the members of the American Bar Association, the American College of Trial Lawyers, the International Academy of Trial Lawyers and the American Bar Association Special Committee on Complex and Multi-District Litigation assisted in preparation of the MANUAL. FEDERAL JUDICIAL CENTER, *Foreward* to MANUAL FOR COMPLEX LITIGATION at xi—xiii (1973).

In closing, a brief discussion may be in order regarding the First Amendment issues which obviously troubled the Third Circuit.

Petitioner USS submits that Local Rule 34(d) is not unconstitutional. The drafters of the MANUAL FOR COMPLEX LITIGATION, after careful consideration, concluded that district courts could supervise communications to potential class members without violation of any Constitutional rights. The MANUAL'S analysis of the First Amendment precedent was as follows:

> "With respect to the rights of counsel and parties under the First Amendment, the authorities are clear that they are to be balanced against the right to a fair trial. Craig v. Harney, 331 U.S. 367 (1947); Bridges v. California, 314 U.S. 252 (1941). And when otherwise protected speech presents a 'reasonable likelihood' of prejudice to the right of a fair trial, it can be constitutionally restricted. United States v. Tijerina, 412 F.2d 661 (C.A. 10 1969). It can hardly be disputed that unauthorized communications which are abusive of class actions threaten the essence of fairness and due process as it is conceived of in complex and multidistrict cases. Rule 23, F.R.Civ.P., has received much criticism on the grounds that it itself, as it is presently written, is abusive. But most of the abuses of class actions stem, not from proper administration of the rule, but from unwarranted actions and communications undertaken without prior approval of court." 1 J. MOORE, FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION §1.41 at 29 n.28 (1973, Part 2).

This Court has long recognized the propriety of judicial regulation of statements likely to affect a judicial proceeding. Recently, in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), this Court noted that communications by counsel and litigants may properly be supervised by the courts. This Court stated:

> "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." 384 U.S. at 363.

Accord, United States v. Tijerina, 412 F.2d 661, 667 (10th Cir. 1969), *cert. denied,* 396 U.S. 990 (1969).

The Third Circuit's case citations to First Amendment decisions are inapposite. Those citations fall into two main groups. The first group involved cases such as *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963), where state legislatures or bar associations tried to preclude cooperative efforts by workers or other citizens to retain attorneys.[22] Such cases are obviously irrelevant to a court's power to control class action communications. They do not involve regulation of communications during the course of a judicial proceeding.

The second group of cases, cited by the Third Circuit, involved publications and statements which may have been made while a case was pending but which

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22. The Third Circuit also cited *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971). (App. A, *infra,* p. 23a).

were not likely to have a direct effect upon the course of the judicial proceeding.[23] They are obviously inapplicable here because the proposed statements by counsel for Plaintiffs are admittedly aimed at having an effect upon decisions to be made by potential members of the alleged class. (App. E, *infra*, p. 53a; App. G, *infra*, pp. 75a-76a).

Petitioner USS submits that the construction of the First Amendment cases made by the drafters of the MANUAL FOR COMPLEX LITIGATION is the correct one, as opposed to the Third Circuit's view of that area.

Certainly this Court's most recent pronouncement in *Sheppard v. Maxwell, supra*, supports the view that it is the duty of a court to regulate communications which might abuse the judicial process.

The Third Circuit's holding that the courts lack the statutory power to regulate such communications is erroneous and should be reviewed by this Court.

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23. The Third Circuit cited *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941). (App. A, *infra*, p. 23a).

CONCLUSION

Petitioner submits that, contrary to the holding of the Third Circuit, in an action alleged to be a class action under Rule 23 of the Federal Rules of Civil Procedure, district courts do have the power to regulate communications by the plaintiffs or their counsel with potential members of an alleged class during the phase of the litigation prior to the certification of the action as a class action. Accordingly, for the reasons stated, the Petition for a Writ of Certiorari should be granted to review this question which is important to all class action litigants.

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Counsel for Petitioner, UNITED STATES STEEL CORPORATION

Dated: May 22, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-

UNITED STATES STEEL CORPORATION,
Petitioner,

v.

JIMMIE L. RODGERS and JOHN A. TURNER,
Respondents,

HONORABLE HUBERT I. TEITELBAUM,
United States District Judge,
Nominal Respondent,

LOCAL 1397, AFL-CIO, UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Nominal Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Appendix A—Slip Opinion of the Court of Appeals
Appendix B—Writ of Mandamus And/or Prohibition Issued By the Court of Appeals
Appendix C—Correction of Slip Opinion of the Court of Appeals
Appendix D—Transcript of Hearing on Motions in the District Court, September 29, 1973
Appendix E—Transcript of Pretrial Conference in the District Court, June 27, 1974
Appendix F—Transcript of Pretrial Conference in the District Court, July 19, 1974
Appendix G—Written Order of the District Court, September 12, 1974
Appendix H—Statutes and Rules Involved

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1815

JIMMIE L. RODGERS and JOHN A. TURNER,
Appellants,

v.

UNITED STATES STEEL CORPORATION; LOCAL 1397, AFL-CIO, UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO

(D.C. Civil No. 71-793)

No. 74-1816

JIMMIE L. RODGERS and JOHN A. TURNER,
Petitioners,

v.

UNITED STATES STEEL CORPORATION; LOCAL 1397, AFL-CIO, UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO

HONORABLE HUBERT I. TEITELBAUM, United States District Judge,
Nominal Respondent

Opinion of the Court of Appeals.

No. 74-2063

JIMMIE L. RODGERS and JOHN A. TURNER,
Appellants,

v.

UNITED STATES STEEL CORPORATION; LOCAL 1397, AFL-CIO UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO

(D.C. Civil No. 71-793)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA AND ON PETITION FOR MANDAMUS

Argued October 24, 1974

Before KALODNER, GIBBONS and WEIS, *Circuit Judges*

Opinion of The Court
(Filed January 24, 1975)

GIBBONS, *Circuit Judge*

These consolidated cases, two appeals and a petition for mandamus, bring before us aspects of a rapidly developing problem area in the law respecting the administration and prosecution of class action litigation. The successful efforts of the Equal Employment Opportunity Commission in achieving massive industry-wide consent decrees has already resulted in a burgeoning number of cases in which labor unions have contended that the decrees have imposed obligations on employers inconsistent with those seniority and job bidding practices for

which they had bargained.[1] In this instance, however, a civil rights organization representing the alleged victims of racial discrimination in the steel industry contends that a consent decree entered in another court is in fact nothing more than a "sweetheart contract" which affords black workers too little relief and which, it argues, will have the practical effect of impeding its efforts to achieve more beneficial results through a class action instituted earlier in the Western District of Pennsylvania. This is because by the time the litigation has proceeded to judgment, many of the class members will have opted out in favor of the relief afforded by the consent decree. Unfortunately, the posture in which the cases are now before us does not permit this Court to contribute much, if anything, to the development of techniques for the balancing of the competing interests involved.

Rodgers and Turner, the appellants in No. 74-1815 and No. 74-2063, and the petitioners in No. 74-1816, are black employees of the defendant United States Steel Corporation and members of the defendant Unions, Local 1397, United Steelworkers of America, and United Steelworkers of America, AFL-CIO. In August 1971 they commenced suit in the Western District of Pennsylvania

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1. At least two other cases recently decided by this court have presented related issues. Equal Employment Opportunity Commission v. American Telephone & Telegraph Co., Nos. 74-1321-1324 (3d Cir., Dec. 19, 1974); Utility Contractors Assoc. of New Jersey v. Toops, Nos. 74-1130-1132 (3d Cir., Dec. 31, 1974); a third case is pending, Jersey Central Power & Light Co. v. Local Unions 327 *et al.*, *appeal docketed*, No. 74-2016. *Cf.* Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799 (3d Cir.), *petition for cert. filed*, 43 U.S.L.W. 3128 (U.S. Sept. 10, 1974).

under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* seeking injunctive relief and back pay to remedy racial discrimination at the Homestead Works of the United States Steel Corporation.[2] Rodgers and Turner sought to maintain the case as a class action pursuant to Rule 23(b)(2) Fed. R. Civ. P. on behalf of a class of more than 1200 black workers at that plant. The parties stipulated that for purposes of money liability the plaintiff class would be defined as all black persons who have been or would be employed at the Homestead Works at any time from August 24, 1971 until May 1, 1973 on jobs in the unit represented by Local 1397, while for purposes of injunctive relief the class would be defined as all such blacks who actually worked in the Homestead Works any time after August 24, 1971 on jobs in the unit represented by the Local. Armed with this stipulation, the plaintiffs moved on May 25, 1972 pursuant to Rule 23(c)(1), Fed. R. Civ. P. for the court to designate the action as a class action. Despite the stipulation the court did not act on plaintiffs' motion. It was renewed on April 17, 1974. The renewed motion was prompted by the filing of two consent decrees on April 12, 1974, in the Northern District of Alabama which resulted from negotiations between the Equal Employment Opportunities Commission, the major steel companies and the United Steelworkers of America, AFL-CIO, the parent union of Local 1397.[3] Plaintiffs' moving papers disclosed that they objected to some of the terms of the consent decrees and that they intended

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2. They also alleged a violation of 42 U.S.C. §1981, and a violation of the defendant unions' duty of fair representation. 29 U.S.C. §§151, 185.

3. United States v. Allegheny-Ludlum Indus., Inc., Civ. No. 74-P-339-S (N.D. Ala., Apr. 12, 1974).

to intervene in the Alabama action and oppose those terms. They also sought leave to send a notice of the pendency of the class action in the Western District of Pennsylvania informing potential class members of the nature of the relief sought and of their right to opt out pursuant to Rule 23(c)(2). At the same time, since the consent decree in the Alabama case provided for a back pay remedy for certain black employees in the steel industry, available only upon the signing of a release, they moved for a protective order preventing communication from the defendants to the stipulated potential class members in the instant lawsuit with respect to the Alabama consent decree.

The Western District of Pennsylvania has adopted Local Rule 34 supplementing Rule 23 Fed. R. Civ. P., and providing in part:[4]

> "(c) Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, Federal Rules of Civil Procedure, as to whether the case is to be maintained as a class action. In ruling upon such a motion, the Court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery of such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the Court for renewal of the motion before the same judge.

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4. See pp. 21 & 22 *infra* for a discussion of the statutory sources of district court rule making.

> (d) No communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the Court approving the communication."

At a hearing on September 29, 1973, on a motion by plaintiffs for leave to communicate with potential class members for discovery purposes, the court ruled that plaintiffs

> "can't contact people who are not named as parties until an order of Court. No person is to be contacted without my permission. As to the specific individual concerned after giving notice to the defendants who the individual is and what you expect to learn from him, then we can determine whether this is sufficient reason to change the general rule.
>
> The transcript of this conference will take the place of and will be considered the order of this Court . . . ." (Appendix at 85a).

Thus, although Rodgers and Turner, or perhaps more precisely their attorneys, who are connected with the NAACP Legal Defense and Educational Fund, Inc.,[5] had already prosecuted the Western District of Pennsylvania case for nearly three years, at the time the Alabama decree was filed they had not yet been able to communicate in any form with the stipulated potential class

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5. The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation engaged in furnishing legal assistance in certain cases involving claims of racial discrimination. It is distinct from the National Association for the Advancement of Colored People, and the distinction is significant for purposes of this case.

members. The Alabama decree provided for communication to those members,[6] and for the solicitation of releases in order to receive back pay.[7]

The renewed motion for class action determination came before the district court in Pennsylvania on April 24, 1974. At that hearing the defendants agreed that they would not make any written communication to the potential class members with respect to the back pay provisions of the Alabama consent decrees without first showing it to counsel for the plaintiffs. In addition, if counsel objected to its language, the defendants agreed to afford plaintiffs time to apply to the court for a protective order. Upon that agreement the motion for a protective order prohibiting the defendants from communicating with the potential class members was withdrawn without prejudice to its renewal. The renewed motion for class action determination and a class action notice was not acted upon. Thus, as of April 24, 1974, the defendants were free to communicate with potential class members concerning back pay provisions of the Alabama consent decrees if they first cleared the communication with the attorney for plaintiffs. However, plaintiffs were still subject to the strictures of the September 29, 1973 order and the prohibition in Local Rule 34(d).

Plaintiffs moved to intervene in the Alabama action for the purpose of seeking to stay or vacate the consent decrees. The Alabama district court granted intervention but denied a stay and rejected their objections to

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6. United States v. Allegheny-Ludlum Indus., Inc., Civ. No. 74-P-339-S (N.D. Ala., Apr. 12, 1974), Consent Decree I, ¶17 at 43. (Appendix at 328a).

7. *Id.*, ¶18(g) at 48. (Appendix at 333a).

the terms of the decree.[8] The plaintiffs appealed to the Fifth Circuit. That appeal is currently pending.

On June 26, 1974 plaintiffs moved before the district court for leave to communicate with six named individual members of the potential class, and for permission for their counsel to meet with the Homestead Chapter of the NAACP. The moving papers explained that two of the six had communicated with Mrs. Elizabeth Smith, Assistant Labor Director of the National Association for the Advancement of Colored People in New York requesting information and assistance with respect to their claims of employment discrimination at the Homestead Works, and that she had referred them to the Legal Defense Fund attorneys. The Homestead Chapter of the NAACP had independently invited counsel to attend a chapter meeting and discuss the subject of discrimination at the Homestead Works. In support of their motion, the plaintiffs contended that the September 29, 1973 order and Local Rule 31(d), as construed by the district court, violated constitutionally protected rights of speech and association. At the same time the plaintiffs renewed their motion for permission to communicate with potential class members. They also made a motion to compel answers to interrogatories and for production of documents. At a hearing on these motions on June 27, 1974 the court, without a written order, specifically forbade the plaintiffs' attorneys from attending a meeting of the Homestead Chapter NAACP, scheduled for July 7. It reserved decision on the com-

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8. United States v. Allegheny-Ludlum Indus., Inc., Civ. No. 74-P-339-S (N.D. Ala., June 7, 1974) (Memorandum of Opinion and Order) (Appendix at 356a-65a). The stay of the release provision pending appeal was denied on June 17, 1974.

munication motions pending briefing of the first amendment issues. It ruled on the discovery motions that all discovery would be stayed until January 15, 1975, stating:

> "*The Court*: There is not the slightest possibility of getting this action disposed of here, anyway, by that time [January 15, 1975] because of our commitments. Class actions by their nature are drawn out types of procedures. Therefore, to have six months to find out the effect of that [Alabama] decree doesn't seem to me to be unreasonable.
>
> *Mr. Marcus*: Are we ordered not to continue discovery until January 15th?
>
> *The Court*: That is what I said. If we find there is a legitimate contention that we ought to have a class action, we will permit you to make that discovery." (Appendix at 188a-89a).

No written order was made either with respect to the July 7th NAACP chapter meeting, or with respect to the staying of discovery. The plaintiffs thereafter moved that the court enter a written order with respect to these rulings and make a certification pursuant to 28 U.S.C. § 1292(b) so that they could pursue an interlocutory appeal.

On July 19 the court orally ruled on the pending motions:

> "*The Court*: Now, as to the motions to certify questions to the Court of Appeals, in the exercise of what I consider to be sound discretion, that is denied.
>
> As to the motion to communicate with the NAACP, that is denied at this time without preju-

dice to renewal of that motion at a time which would appear to be more appropriate to me.

Now, as to the motion to communicate with individuals who have requested that they discuss matters with counsel, that motion is granted. However, the previous order forbidding solicitation and requiring prior Court approval of all communications with any other individuals is left intact. You may talk to those six individuals, but you may not solicit anybody else, nor may you make any communications with anybody else except pursuant to Court approval." (Appendix at 259a-60a).

At this same hearing, the attorneys for the defendants called to the court's attention the fact that only two of the six persons supposedly seeking advice had spoken directly to Mrs. Smith at the NAACP's New York office. The court ruled that the attorneys could speak to the other four only if they obtained affidavits from them (or any other potential class member) stating how they happened to obtain counsel. This colloquy followed:

"*The Court*: Let the people do this on their own. I can't do that. In other words, the additional people would have to do that on their own. We don't want to make a mistake about that. If there is any indication that these people are soliciting in that regard, that is barratry, and I will refer it to the District Attorney of Allegheny County. If there is any indication that counsel is doing that, I will refer it to the Disciplinary Committee. I don't want that, and I can't overemphasize that, so if individuals do it, I will refer it to the District Attorney, or you may, Mr. DeForest. If there is any indication of counsel doing it, we will go to the Disciplinary Committee.

Mr. DeForest: To make it clear so there is no misunderstanding later, your prohibition would include the NAACP referring individuals to Mr. Marcus?

The Court: Well, if people want to come to see Mr. Marcus, I don't intend to stop them from doing that. Before he may contact them, though, I want affidavits from them stating, inter alia, how they happened to contact him.

Mr. Marcus: We may contact them to that extent to get that affidavit?

The Court: If they contact you first.

Mr. Marcus: If they contact me first.

The Court: And I would want an affidavit saying they did contact you, that they do want to do that, and how they happened to do that. My restriction applies to the NAACP, too. I don't want the NAACP running clients for Mr. Marcus.

Mr. Schnapper: I take it that you are not ordering the NAACP, which isn't here technically, that if someone came and said, 'I have a problem. What should I do?'

The Court: I'm not restricting that if they do that on their own, but if they don't do it on their own, I don't want the organization to suggest to people that they should have a problem or seek counsel." (Appendix at 263a-64a).

The attorneys for plaintiffs then suggested that, in lieu of the prohibition on communication, they would agree not to represent any such persons other than in a pending class action. The court then made clear that its purpose in continuing the ban on communication was to prevent discussion of the Alabama consent decree:

"*The Court*: That is exactly what I don't want. That is exactly what I do not want.

Mr. Marcus: This avoids any solicitation and barratry where we agree in advance not to represent them.

The Court: That is worse than enabling people to go to an alleged interested party and attempt to sabotage the [Alabama] settlement in Judge Pointer's court, and I don't want that to happen." (Appendix at 265a-66a).

At the July 19, 1974 hearing, the court also considered plaintiffs' objections to a proposed letter to class members, recently approved by the Alabama court without any notice to plaintiffs or opportunity to be heard. Despite the agreement of April 24, 1973, the court held that it would not rule on plaintiffs' objections to the letter but would leave that matter entirely to the Alabama court.[9] Although the plaintiffs made a request for written orders, none were filed.

Plaintiffs then filed a notice of appeal from the orders of June 27, 1974 and July 19, 1974.[10] They also filed a petition for a writ of mandamus or prohibition with respect to those orders.[11] On August 22, 1974 they moved before this Court for a stay of the district court orders. The motion was denied on August 23, 1974 for lack of a district court order "with reasons given for its action." Judge Garth stated that he would also deny the stay "because the underlying district court orders of

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9. On July 23, 1974 plaintiffs appeared before the Alabama court. It did not authorize any communication to the Homestead class members.

10. No. 74-1815.

11. No. 74-1816.

June 27 and July 19 do not appear in the record." They did not because they appear only in the reporter's transcript, and not in any separate order signed by the court. Plaintiffs then applied to the district court for a written order embodying the June 27 and July 19, 1974 rulings. On September 12, 1974 the district court signed a written order embodying the June 27 and July 19, 1974 rulings. Plaintiffs filed a protective notice of appeal from that order.[12] This Court consolidated the cases. The defendants moved to dismiss the two appeals as interlocutory, and that motion was referred to this panel with the consolidated cases. Plaintiffs also renewed their motion for a stay pending appeal, which motion is also before this panel.

We are asked to review, either by appeal or by mandamus:

1. The order postponing class action determination until at least January 15, 1975;
2. The order staying all proceedings in the district court, including all discovery, until at least January 15, 1975;
3. The orders restricting communications with potential members of the class by the plaintiffs or their attorneys.

Plaintiffs contend that all three orders are appealable under 28 U.S.C. §1291 as collaterally final, that all three orders if not collaterally final, are appealable under 28 U.S.C. §1292(a)(1) as interlocutory orders granting or denying injunctive relief, and that even if not appealable are subject to review on their petition for a writ of mandamus or prohibition.

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12. No. 74-2063.

I. APPEALABILITY UNDER §1291

Plaintiffs rely on the interpretation of the final order requirement announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The difficulty with this reliance is that while the orders in question may be collateral, they must also be final. There are two aspects of the final judgment rule. One is that the order be the final disposition of the entire case. The other is that the order be the final disposition of the issue. The *Cohen* rule permits a limited exception with respect to the first aspect but not with respect to the second. Before an order is appealable as collaterally final three requisites must be found: The order must be a final rather than a provisional disposition of an issue; it must not be merely a step toward final disposition of the merits; and the rights asserted would be irreparably lost if review is postponed until final judgment.

Clearly, the order postponing class action determination and the order staying all proceedings are tentative rather than final. The court has made it clear that they will be reconsidered after January 15, 1975. They cannot, by even a most expansive reading of the *Cohen* doctrine, be brought within that holding. And this Court has always read *Cohen* as a narrow rather than an expansive exception to the final judgment rule. *Hackett v. General Host Corp.*, 455 F.2d 618, 621 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); *Borden Co. v. Sylk*, 410 F.2d 843, 845-46 (3d Cir. 1969).

The lack of finality of the order restricting communications to potential class members is not quite so clear. The order grants plaintiffs' motion for leave to communicate with two potential class members, and imposes an affidavit requirement before communicating with four others. As to those four only the affidavit

requirement is in issue. We do not think that the imposition of this requirement can be regarded as more than a step in the process of the court's ultimate determination that the case will or will not be allowed to proceed as a class action. Moreover, its imposition has not been shown to be likely to cause injury which would be so irreparable as to be uncorrectable on appeal after final judgment. The order does, however, continue in effect the blanket prohibition of communications under Local Rule 34(d). Appealability of this feature is a closer question. The defendants point out that the district court has postponed communication for discovery purposes subject to reconsideration when it reconsiders the general stay of the lawsuit, and that this ruling like the stay, must be considered to be only tentative. Looked at from the standpoint of its effect on discovery we are inclined to agree. But the order has another actual and intended effect. It prohibits communication with potential class members as to the effect of the Alabama consent decree on their rights in the instant case, should class action treatment be permitted. If by virtue of the order, potential class members are left uninformed, and sign releases pursuant to the Alabama consent decrees, those releases will undoubtedly be pleaded in the district court if a class action determination is made. When looked at from that standpoint, the finality of the order for purposes of the *Cohen* rule is a close issue. But, because, as will be seen hereafter, we have an alternative basis of jurisdiction to consider the communication order we need not prematurely decide a difficult question of federal appellate jurisdiction.

II. APPEALABILITY UNDER §1292 (a) (1)

Plaintiffs contend that the orders postponing class action determination and staying discovery until January 15, 1975 are appealable as interlocutory orders denying injunctive relief. The complaint seeks permanent injunctive relief for the benefit of the class, and they urge that the effect of the postponement is the same as an order refusing the injunction.

An interlocutory order "granting, continuing, modifying, refusing or dissolving" an injunction is one which temporarily awards or refuses to award all or part of the injunctive relief sought by a claimant. 9 J. Moore, *Federal Practice* ¶110.19, ¶110.20[1] (2d ed. 1973). An order that merely continues the case and does not reach the merits of the claim is nothing more than a step in the processing of the case and does not fall within §1292 (a)(1). *See Switzerland Cheese Ass'n v. E. Horne's Market,* 385 U.S. 23, 25 (1966); *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955); *Morgenstern Chemical Co. v. Schering Corp.,* 181 F.2d 160, 162 (3d Cir. 1950). Here, the court has never considered the plaintiffs' request for injunctive relief. There was no motion for a preliminary injunction and there has been no final hearing. In *Hackett v. General Host Corporation,* 455 F.2d at 622, we recognized that there might be instances where the refusal of a court to grant a class action designation pursuant to Rule 23(c) might amount to a denial of an injunction broader than would be appropriate for individual relief, and that such a refusal might support appellate jurisdiction under §1292(a)(1). But the situation which we hypothesized in *Hackett* is not presented by this record with respect to the orders postponing class action determination and staying discovery. First, the court has not refused the class action determination, but only deferred decision. Second, the

refusal cannot be construed as a denial of a preliminary injunction since none was sought. Third, the postponement poses no bar to the broadest injunctive relief sought in the complaint should a preliminary injunction now be sought, since the class action determination may then be made.

The order barring communications stands on a different footing. It is presently operative, has nothing to do with the relief sought in the complaint, and is collateral to such relief except to the extent that by preventing communication it may result in the execution of more releases solicited pursuant to the Alabama consent decree and thereby contract the size of the ultimate class. Looked at as an order collateral to the relief sought in the complaint, and as a presently operative injunction, the communication order might be appealable under §1292(a)(1). *See United States v. Schiavo,* 504 F.2d 1 (1974). It is not entirely clear, however, that the court intended its order to operate as an injunction, the violation of which would be punished by contempt. At one point in the June 27, 1974 hearing the Court said:

> "Do you want to withdraw your request for class action? You shouldn't have restrictions." (Appendix at 180a).

Thus, if the prohibition on communication pursuant to Local Rule 34(d) were not obeyed, no more may have been intended by the court other than the denial of class action treatment. The September 29, 1973 transcript, it is true, contains language indicating that it would take the place of an order of the court, and may be interpreted as an order "that they can't contact people." (Appendix at 85a). If the September 29, 1973 order was the grant of an injunction, then the July 19, 1974 oral order and the September 12, 1974 written order were refusals to vacate or modify an injunction, appealable under

§1292(a)(1). The attorneys for the plaintiffs, with appropriate caution, declined to test an ambiguous order by violating it and risking contempt. But their doubt does not resolve the problem for us. We conclude, from the fact that there was no compliance with the procedural safeguards of Rule 65, and from the procedural posture in which the matter was before the court on September 29, 1973, that an injunction was not intended. We do so well aware that in making its rulings on July 19, 1974 the court intended to protect the Alabama decrees. That intention is not controlling. The September 29, 1973 order and the July 19 and September 12, 1974 orders did no more than refuse to grant the relief of excusing compliance with Local Rule 34(d). The attorneys could have violated the rule and run the risk of adverse action on their motion for class action determination.

Thus we conclude that none of the orders appealed from are reviewable under §1292(a)(2).

III. Availability of Review Under § 1651

Plaintiffs' petition for § 1651 relief seeks review of the three challenged rulings in the alternative, either by the present equivalent of the prerogative writ of mandamus, or prohibition, or certiorari. The power to issue such writs in aid of our potential appellate jurisdiction[13] comprehends our responsibility for the orderly and efficient administration of justice within the circuit.[14] The power will not, of course, be used to control the decisions of the trial court even if erroneous, made within that court's jurisdiction, but may be used to confine

13. McClellan v. Carland, 217 U.S. 268 (1910).

14. La Buy v. Howes Leather Co., 352 U.S. 249 (1957); Schlagenhauf v. Holder, 379 U.S. 104 (1964).

the trial court to the proper sphere of its lawful power,[15] or to correct a clear abuse of discretion.[16] Applying these standards for §1651 relief we conclude that only one of the three orders may be reviewed at this time.

The order postponing class action determination certainly cannot, in the context of this case, be regarded as outside the sphere of the court's discretionary power or a clear abuse of discretion. In *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 43 U.S.L.W. 3213 (U.S., Oct. 15, 1974), we recognized that the district court had precisely such a power in some circumstances. Keeping in mind that no motion was made for a preliminary injunction, and that the Alabama consent decrees may make available to members of the potential class much of the injunctive relief which the plaintiffs, if successful, might achieve at final hearing, we cannot hold that postponement from June 27, 1974 to January 15, 1975 was an abuse of discretion. We have no occasion to consider whether postponement from the filing of the complaint until June 27, 1974 was proper, since it is only the court's action at that time and on July 19, 1974 which is before us. In the circumstances existing on those dates there was no clear abuse of discretion and a § 1651 writ will not issue.

What we have said about the order postponing class action determination applies with equal force to the court's decision to stay all proceedings until January 15, 1975. The district court had inherent discretionary authority ot stay proceedings pending litigation in another court. *E.g., Landis v. North American Co.*, 299

15. Will v. United States, 389 U.S. 90 (1967).

16. *E.g.* Texaco, Inc. v. Borda, 383 F.2d 607 (3d Cir. 1967).

U.S. 248, 254-55 (1936). Considering the circumstances here there was no clear abuse of discretion in doing so.

The order restricting communications with potential members of the class by the plaintiffs or their attorneys, however presents quite a different problem. That order, in effect, continues in operation the across-the-board prohibition of communication authorized by Local Rule 34(d). Plaintiffs contend that this rule, as applied, is not authorized by any power conferred by Congress on district courts, is inconsistent with the Federal Rules of Civil Procedure, and violates the first amendment. Clearly, if the rule suffers from any of the claimed defects, the prevention of its operation is a matter of confining the district court to the proper sphere of its lawful power. *See Sanders v. Russell*, 401 F.2d 241, 243 (5th Cir. 1968). Before we get to the merits of plaintiffs' challenge to Local Rule 34(d), however, it is appropriate to set to one side a peripheral consideration. It is clear from the colloquy quoted above that one motivation for the district court's July 19, 1974 decision to continue in effect the ban on communication was to protect the operation of the Alabama consent decrees. Whether the Western District of Pennsylvania would have jurisdiction, on a proper application pursuant to Rule 65, Fed. R. Civ. P. to issue an injunction in aid of the jurisdiction of the Alabama district court, is a question which need not be resolved. As we pointed out at page 17 *supra*, no such application was made. Thus, the merits of the order must stand or fall on the validity of Local Rule 34(d).

The Local Rule operates within two separate contexts: (1) during the period between the filing of a complaint seeking class action treatment, and the Rule 23(c)(1) determination to permit the action to so pro-

ceed; and (2) after such a determination has been made. The justification urged for the Local Rule varies in the separate contexts. Once a favorable class action determination has been made, the justification for the Rule is said to flow from the court's power, and even duty, to prevent the Rule 23 procedural device from being misused by communications which are false or misleading.

We need not decide whether, in the period following class action determination, the court's undoubted power to impose some restrictions on first amendment rights during the course of judicial proceedings would justify a blanket prior restraint as broad as that set forth in Local Rule 34(d). In this instance we are presented only with the first context. And it is in that context that the interaction of Local Rules 34(c) and (d) becomes evident. The two provisions make clear that the District Court for the Western District of Pennsylvania has superimposed upon Rule 23 a condition that the class action device be available only to those plaintiffs willing to submit to an assertion of a dual power by the court—the power to postpone class action determination and to impose a prior restraint in the meantime. That the prior restraint may be of extended duration is clear; in this case it has continued for more than three years.

The imposition of such a condition upon access to the Rule 23 procedural device certainly raises serious first amendment issues. *See New Jersey State Lottery Comm'n. v. United States*, 491 F.2d 219 (3d Cir.), *cert. granted*, 42 U.S.L.W. 3652. (U.S., May 28, 1974). There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Inc. to communicate with potential black class members on whose behalf they

seek to litigate issues of racial discrimination. *See, e.g., United Transportation Union v. State Bar,* 401 U.S. 576 (1971); *NAACP v. Button,* 371 U.S. 415 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. *See Wood v. Georgia,* 370 U.S. 375 (1962); *Craig v. Harney,* 331 U.S. 367 (1947); *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Bridges v. California,* 314 U.S. 252 (1941). Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. *See* T. Emerson, *The System of Freedom of Expression* 449 *et seq.* (1970).

We should not decide difficult constitutional issues, however, without first determining if there is a statutory ground for decision. *See Hagans v. Lavine,* 415 U.S. 528 (1974). Thus, we must first inquire whether the district court had any statutory authority to adopt Local Rule 34(b) for application in a context like the one herein presented. In making this inquiry we must take into account that the reason urged for applying the prohibition on communication is, in the words of the district court, the prevention of "barratry."

The only statutory sources of district court rule making power are Rule 83, Fed. R. Civ. P. and 28 U. S. C. § 2071.[17] These statutes, which probably must be read in *pari materia,* are broad enough to permit dis-

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17. Rule 83 states in full:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any distirct court shall upon their

trict court rule making with respect to the conduct of attorneys in their practice before the court. *See, e.g., Schlesinger v. Teitelbaum,* 475 F.2d 137, 141 (3d Cir.), *cert. denied,* 414 U.S. 1111 (1973); *Sanders v. Russell, supra* at 245. But the grant of rule making authority in Rule 83 authorizes the district courts to "regulate their practice in any manner not inconsistent with these rules" and §2071 permits rules "consistent with the Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." There is no general grant of legislative authority to regulate the practice of law. *Gamble v. Pope & Talbot, Inc.,* 307 F.2d 729 (3d Cir.), *cert. denied,* 371 U.S. 888 (1962). The rules adopted must be consistent with the policy underlying Rule 23; that is a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit. There is no federal common law offense of barratry, and the policy reflected in Rule 23 undoubtedly would prevent the Commonwealth of Pennsylvania from interfering, in the guise of preventing barratry, with its full implementation. Moreover, if we were to construe Rule 83 and § 2071, as they are limited by Rule 23, to

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17. (Cont'd.)
promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."
28 U.S.C. § 2071 states in full:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

authorize the adoption of local rules for controlling barratry, a serious constitutional issue of overbreadth would be presented by the Local Rule in its present form. The Rule imposes a prior restrain on all communication, not merely communication aimed at stirring up litigation. Think what our reaction would be to a state statute which required that attorneys submit all communications to be made to persons not yet their clients to the prior approval of a court. Rather than decide that constitutional issue, however, we can dispose of this case by way of a statutory interpretation. We conclude that Congress never intended Rule 83 or § 2071 to empower the district courts to require prior judicial approval of communications between plaintiffs, or their attorneys, and third parties, when such communications seek to encourage common participation in a lawsuit. Thus, Local Rule 34(d) as presently drawn was outside the power granted to the district court and its enforcement may be prevented by this court pursuant to § 1651.

It should be understood that we are not here considering the validity of a local rule regulating the content of communications to class members after a class action determination has been made. Drafting such a rule would require a careful consideration of overbreadth. Whether prior screening of every communication is really necessary for the court to discharge its obligations to class members is a matter which the judges of the Western District of Pennsylvania may well address. The limited issue before us, however, is whether the district court can, *prior* to making a class action determination, insist on compliance with Local Rule 34(d) as a condition to the further consideration of a Rule 23(d)(1) motion. We hold that it may not.

We are aware that the District Court for the Western District of Pennsylvania adopted Local Rule 34(d) in response to the suggestion in the *Manual for Complex Litigation* prepared under the sponsorship of the Federal Judicial Center. *See* 1 J. Moore, *Federal Practice* ¶1.41, at 27-32 (2d ed. 1974, Part 2). The *Manual*, outlining specific potential abuses of Rule 23, proposes that those areas be controlled by local rules. But instead of proposing specific rules aimed at specific abuses, it suggests:

> "In order to guard against unapproved action of [the] sort [referred to], it is recommended that each court adopt a local rule forbidding *unapproved* direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members, who are not formal parties, provided that such proposed written communications submitted to and approved by order of court may be distributed to the parties or parties designated or described in the court order of approval." 1 J. Moore, *supra*, at 28-29 (emphasis in original) (footnote omitted).

The *Manual* goes on, however, to suggest that the local rule should except certain circumstances from its operation.[18] These exceptions were not incorporated in Local

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18. The appendix to the *Manual* includes the following proposed rule:

> "Suggested Local Rule No. 7—Prevention of Potential Abuses of Class Actions
>
> In every potential and actual class action under Rule 23, F.R. Civ. P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class mem-

Rule 34(d). *Id.* at 29. Moreover the committee which drafted the *Manual* probably went too far in its apparent assumption that *Craig v. Harney, supra* and *Bridges v. California, supra* would permit the vesting of unreviewable discretion in a district court to impose a prior restraint on communication or association. 1 J. Moore, *supra,* at 29 n.28. In any event the panel had no power to enlarge the statutory rule making authority of the district courts.

A writ will be granted with respect to the orders restricting communications with potential members of the class by the plaintiffs or their attorneys. The petition for § 1651 relief will be otherwise denied. The appeals

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18. (Cont'd.)
ber not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addresses and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addresses. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of

will be dismissed. The motions for a stay of the district court's orders pending appeal will be denied. The writ in No. 74-1816 and the mandate in Nos. 74-1815 and 74-2063 will issue forthwith. Each party to bear their own costs.

WEIS, *Circuit Judge,* Concurring:

I agree with Parts I, II, and much of III of the majority opinion but differ with its conclusion that the district court does not have the right to promulgate a rule

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18. (Cont'd.)
justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel or misrepresenting the status, purposes or effect of the action and orders therein. *Nor does the rule forbid communications protected by a constitutional right.* However, in such instances the person making the communication shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral."

1 J. Moore, *supra,* ¶ 1.41, at 188-89 (emphasis supplied).

Since none of the examples set forth beginning with the third sentence of the proposed rule, or the limitations contained in its second paragraph were included in Local Rule 34(d), we have no occasion to consider whether the limitations, especially the italicized por-

applicable to class actions before certification has been ordered.

Rule 23 provides a means for resolving a controversy affecting a large number of parties in one proceeding in a comparatively expeditious fashion. In granting this greater flexibility, however, the rule generated a higher potential for abuse. It was this problem that led the Committee on Complex Litigation to consider the necessity for local rules and ad hoc pretrial orders.

The Manual prepared by the Committee cites four objectionable features sought to be controlled by the promulgation of a rule limiting communication.

"(1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action;

(2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action;

(3) solicitation by formal parties of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and

(4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of court orders therein and which may confuse actual and potential class members and create impressions which may reflect adversely

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18. (Cont'd.)
tion, would suffice to cure the overbreadth of the first two sentences of the *Manual* rule or that the examples, under the rule of *ejusdem generis,* would sufficiently limit such overbreadth.

> on the court or the administration of justice." Manual for Complex Litigation, Part I § 1.41, at 22 (1973).

As the Manual indicates, the purpose of the rule is not merely to battle barratry but to prevent abuses of the class action device. The potential for harm does not spring into being instanter upon the certification of a class action but exists before that time. *Carlisle v. LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972); *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972), *Stavrides v. Mellon National Bank & Trust Co.*, 60 F.R.D. 634 (W.D. Pa. 1973). To limit the effect of a rule to conditions existing after certification would be to unduly limit the ability of the court to cope with the problems.

The recommendation of the Committee on Complex Litigation has received approval from text writers. In 7A Wright & Miller, Federal Practice and Procedure: Civil § 1797, at 239, the author states:

> ". . . because it could lead to abusive practices, the district court should exercise some control over communications between formal parties and passive class members. The Manual for Complex and Multidistrict Litigation suggests the adoption of a local rule 'forbidding unapproved direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members, who are not formal parties * * *.' This position is sound and provides the court with a valuable mechanism for carrying out the policies underlying Rule 23(e). In the absence of a local rule, the court can secure the same result by issuing an order corresponding to the suggested local rule on an ad hoc basis."

See also 3B Moore's Federal Practice ¶ 23.75, at 23-1475.

I agree with the majority that Local Rule 34, as drafted, should be set aside—not, however, because of the time period in the litigation at which it becomes effective but, rather, because it is overbroad in its wording. The suggested rule found in the Appendix to the Manual for Complex Litigation, Part II § 1.41, at 145, is more narrowly drawn and, as the majority points out, specifically exempts communications protected by a constitutional right.[1]

There is a distinction between litigation alleging violations of civil rights and a routine damage suit, and that factor is troublesome here. As an indication of its concern with the effective presentation of civil rights cases, Congress has provided for the allowance of counsel fees in many situations. This action tends both to negate any intention by Congress to authorize a local rule of court that unduly infringes upon free speech in that sphere as well as to remove one of the reasons for controlling communication with potential class members. A broad interpretation of Local Rule 34 in the factual posture of this case also runs afoul of the right to group legal action directed to the preservation or protection of the legal interests of an organization's members. *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971). Accordingly, it seems to me that Local Rule 34, as it applies to civil rights actions, must be set aside as being unnecessarily broad. However, I would not foreclose the district court from enacting a rule similar to that suggested by the Manual, applicable whenever class action designation has been requested as well as after certification has been granted.

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1. Local Rule 34 was enacted in 1971. The Manual's suggested rule at that time did not contain the exemption for communications protected by a constitutional right as now appears in the 1973 edition.

Writ Issued By the Court of Appeals.

APPENDIX B

Writ of Mandamus and/or Prohibition Issued by the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1816

JIMMIE L. RODGERS and JOHN A. TURNER,
Petitioners

vs.

HONORABLE HUBERT I. TEITELBAUM,
United States District Judge,
Respondent,

UNITED STATES STEEL CORPORATION;
LOCAL 1397, AFL-CIO,
UNITED STEELWORKERS OF AMERICA; and
THE UNITED STEELWORKERS OF AMERICA,
AFL-CIO

Writ of Mandamus and/or Prohibition

UNITED STATES OF AMERICA, THIRD JUDICIAL CIRCUIT SS.

To the Honorable Hubert I. Teitelbaum, Judge of the District Court for the Western District of Pennsylvania, GREETINGS:

Whereas the Honorable Hubert I. Teitelbaum by an oral order uttered July 19, 1974, said oral order being embodied in a written order dated September 12, 1974, restricted communications with potential members of the class of the petitioners or their attorneys; and

Whereas Jimmie L. Rodgers and John A. Turner, petitioners in the above-entitled case in this the United States Court of Appeals for the Third Circuit, filed, on

August 12, 1974, a petition for writ of mandamus and/or a writ of prohibition requesting this Court to vacate the several orders of the said Honorable Hubert I. Teitelbaum in these premises, and the local rule of court enumerated as Rule 34(d); and

Whereas respondents have filed answers and the matters have been fully briefed by both sides, and argued; and

Whereas after due deliberation this Court rendered its opinion and the same was filed this day, in which the Court directed that the prayer of the petition insofar as it requested relief from the orders restricting communications with potential members of the class by the petitioners or their attorneys be granted; and

Whereas this Court, on this date has entered an order directing the Clerk of this Court to issue a writ of mandamus and/or writ of prohibition in accordance with the opinion of this Court filed herein;

Now Therefore the Honorable Hubert I. Teitelbaum is hereby Required and Directed, immediately after the receipt of this Writ, and without unreasonable delay, to vacate the aforementioned orders of July 19, 1974 and September 12, 1974 insofar as they restrict communications with potential members of the class by the plaintiffs or their attorneys, and is Further Required and Directed to abstain from enforcing Local Rule 34(d) of the United States District Court for the Western District of Pennsylvania in the case in the same District Court at No. 71-793.

THOMAS F. QUINN
Clerk of the United States
Court of Appeals for the Third Circuit

Dated: January 24, 1975

APPENDIX C

Correction of the Slip Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1815

JIMMIE L. RODGERS and JOHN A. TURNER,
Appellants,

v.

UNITED STATES STEEL CORPORATION; LOCAL 1397, AFL-CIO UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO

(D.C. Civil No. 71-793)

No. 74-1816

JIMMIE L. RODGERS and JOHN A. TURNER,
Petitioners.

v.

UNITED STATES STEEL CORPORATION; LOCAL 1397, AFL-CIO UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO

HONORABLE HUBERT I. TEITELBAUM, United States District Judge,
Nominal Respondent

No. 74-2063

JIMMIE L. RODGERS and JOHN A. TURNER,
Appellants,
v.
UNITED STATES STEEL CORPORATION and LOCAL 1397, AFL-CIO UNITED STEELWORKERS OF AMERICA and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO

(D.C. Civil No. 71-793)

Before KALODNER, GIBBONS and WEIS, *Circuit Judges*

Order

It is ORDERED that the slip opinion filed January 24, 1975 which reads:

Page 22, Line 20 to 23

"We conclude that Congress never intended Rule 83 or § 2071 to empower the district courts to require prior judicial approval of communications between plaintiffs, or their attorneys, and third parties, when such communications seek to encourage common participation in a lawsuit."

should now read:

"We conclude that Congress never intended Rule 83 or § 2071 to empower the district courts, as was attempted in Local Rule 34(d) to require prior judicial approval of communications between plaintiffs, or their attorneys, and third parties, when such communications seek to encourage common participation in a lawsuit."

By THE COURT,

JOHN J. GIBBONS,
Circuit Judge.

Date: February 21, 1975.

APPENDIX D

Transcript of Hearing On Motions in the District Court, September 29, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JIMMIE L. RODGERS and JOHN A. TURNER vs. UNITED STATES STEEL CORPORATION and LOCAL 1397, AFL-CIO UNITED STEEL WORKERS OF AMERICA	Civil Action 71-793

September 29, 1973
Pittsburgh, Pennsylvania

BEFORE: HON. HUBERT I. TEITELBAUM, J.

Transcript of Hearing on Motions

COUNSEL PRESENT

On behalf of the Plaintiffs:
JOHN R. LEETE, ESQ.
BERNARD D. MARCUS, ESQ.

On behalf of the Defendants:
LEONARD L. SCHEINHOLTZ, ESQ.
WALTER P. DEFOREST, ESQ.
EDWARD N. STONER, II, ESQ.

September 29, 1973
Pittsburgh, Pennsylvania

The Court: In the captioned matter the defendants filed two motions for summary judgment under Rule 56, one against each of the plaintiffs. I have determined

that the decisions on the motions for summary judgment will be held in abeyance until a determination has been made as to whether or not this is an appropriate matter for class action under Rule 23. For this reason the motions will be held in abeyance until that time.

The plaintiffs have filed motions to compel answers to interrogatories and for production of documents pursuant to Rule 37. It appears as a result of a conference this morning that many of the interrogatories go to the merits of the case rather than to the question of whether this is appropriate for class action procedure.

For that reason I have requested, and plaintiffs' counsel have agreed to withdraw their motions to compel answers to interrogatories and for production of documents under Rule 37 and to submit new interrogatories [and motions] to produce, if appropriate, directed only to the question of whether or not this is an appropriate matter for class determination.

Mr. Leete: My understanding, if the Court please, is that the Court stated that we are taking a liberal view on the class determination discovery, and I state this only in the hope that we can proceed with it without having to resort to a motion to compel—

The Court: If a matter goes to both the merits and class determination, I'm going to direct that it be complied with so that we can get along with the matter. If it is purely as to the merits, however, I will not.

Now, that leaves before us this morning the motion for permission to communicate with members of the proposed class. I would like counsel to state for the

record why they believe that it is necessary at this phase of the case for us to downtrack [do that], which is not the normal policy of the court, and permit such before determination of the class.

Mr. Marcus: We ask communication with members of the class for purposes which are relevant to determine which areas and which plans which we think should be presented within the scope of the class, and specifically for obtaining background information as to the general policies and practices, and systems in effect; that the company at various times used testing policies, seniority policies, alleged policies of segregated jobs in areas we did not explore were class members at this time, specific claim of discrimination.

The Court: Don't you think you can get that by interrogatories rather than by discussing it with members of the class, many of whom wouldn't have been employees back at that time and most wouldn't have that type of technical knowledge.

Mr. Marcus: We attempted, and we didn't get it.

Mr. Leete: They will not permit any discovery on any matter relating to any time period before the effective date of the 1964 Civil Rights Act.

Mr. Scheinholtz: We have given them a mass of information under Rule 33(c). They have not complained, and I think we have a right to rely on that rule. There has been no complaint on that. However, this meant [they spent] only two hours looking at it. That information deals with approximately seven years which they haven't looked at. Now they want to [the] same type of information going back 15 more years,

back to 1950, and it took us 2000 hours to collect the information which they looked at in two hours.

The Court: Have you thoroughly looked at what your have?

Mr. Leete: We have examined samples of the types of documents available. Mr. Scheinholtz is meaning to tell you that the plaintiffs are following the same course of discovery that was used in the United States Steel case tried not so long ago in Birmingham, Alabama. We are doing a lot of computerized discovery data, and both parties have spent a lot of time and effort toward getting that data reduction going.

Mr. Scheinholtz: How much time have you spent in the room where we have produced the documents that you have asked for?

Mr. Leete: I don't think two hours is inaccurate. We have samples—

The Court: I am disturbed if you put the defendant to the task of spending 2000 hours to collect data which you examined in less than two hours. Now, something is wrong with that. Then you come back and you want to have the same data for 15 years.

Mr. Marcus: The bulk of it is in employee records, and we determined that it is in this stage not a sensible way to go about discovering. For that reason we have just changed course and are trying to get a lot of information through computerized discovery which has been proceeding. A lot of the other data which we seek for discovery are charts, seniority lists, testing practices, and not 12,000 individual employee records.

Mr. DeForest: We have produced that information you are asking about right now, charts, seniority information in that room.

The Court: We will delay decision whether you get anything behind the seven years until you have thoroughly examined what you have and file a report with the court stating why that is inadequate for your purpose, and what you need in addition thereto.

As to discussion with individual members of the class, if you will notify the defendants in advance whom you intend to contact in the class and what you intend to ask them, and what you think you can get from them, then I will permit you to contact them for the limited purposes that you have set forth, giving the right to the defendant to object to your contacting any particular member of the class, because it seems to me that this is absolutely going to be an exercise in futility when you go to an employee of the United States Steel Corporation and ask him what testing means were used in 1962. I can't conceive of him knowing, and I think it would be a waste of time.

Mr. Scheinholtz: First, I think what they are asking violates the specific rule of the local court which is that there should be no communication with unnamed members of the class prior to a class determination.

The Court: They are not going to be unnamed. They will have to tell you who they are.

Mr. Scheinholtz: When they say unnamed, they mean undesignated as plaintiffs. There are only two plaintiffs in this class. They real purpose of this is that they recognize the weakness of this case as a class action on the basis of the pleadings and on the basis of

the deposition that we took of the plaintiffs, which you haven't seen.

The Court: The ruling of the Court is that they can't contact people who are not named as parties until an order of Court. No person is to be contacted without my permission. As to the specific individual concerned after giving notice to the defendants who the individual is and what you expect to learn from him, then we can determine whether this is sufficient reason to change the general rule.

The transcript of this conference will take the place of and will be considered the order of this Court, no written order being necessary by agreement of all parties.

APPENDIX E

Transcript of Pretrial Conference in the District Court, June 27, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JIMMIE L. RODGERS and JOHN A. TURNER, Plaintiffs vs. UNITED STATES STEEL CORPORATION, et al. June 27, 1974 Pittsburgh, Pennsylvania	Civil Action 71-793

BEFORE: HON. HUBERT I. TEITELBAUM, J.

Transcript of Pretrial Conference

COUNSEL OF RECORD
PRESENT

John H. Goodworth
Official Reporter

June 27, 1974
Pittsburgh, Pennsylvania

The Court: This is the case of Jimmie L. Rodgers and John A. Turner vs. United States Steel Corporation, Local 1397, AFL-CIO United Steelworkers of America, and the United Steelworkers of America, AFL-CIO, at Civil Action 71-793.

I have several motions. The first motion is a renewed motion to compel answers to interrogatories and pro-

duction of documents under Rule 37. Is this matter not covered by the case in another jurisdiction? Why are we going into this?

Mr. Marcus: We don't believe so, Your Honor. In fact, the most recent opinion from Judge Pointer stated that resolution in the form of issues between the government and the defendants doesn't preclude additional or even inconsistent relief to private parties in litigation.

The Court: This isn't that.

Mr. Marcus: I feel that Judge Pointer made it clear that where the maintenance of private actions would be impaired or impeded in other jurisdictions—

The Court: Do you want a private action on behalf of Jimmie Rodgers and John Turner?

Mr. Marcus: He refers to class actions and states on page 7 of his opinion. It has specific reference to the mailing of back pay notices that he would insert with other forms—

The Court: What was that?

Mr. Marcus: We raised in the intervention —

The Court: What did you say Judge Pointer would be willing to do? How he should proceed?

Mr. Marcus: Yes.

Mr. Goldstein: The case in the Northern District of Alabama, consent decrees to which parties in this case were not privy, that is, the plaintiffs, were not privy to on the merits. The consent decrees were entered without any notice to the plaintiffs in this case or their class members, and consequently the plaintiffs or their class members never had their day in court on the determination of discrimination or appropriate relief.

Consequently we feel the plaintiffs or the class in this case could not possibly be bound, and that the case in the Northern District of Alabama couldn't make this case moot under any circumstances.

The Court: Isn't it on the same basis?

Mr. Goldstein: They are both brought under Rule or Title VII. They are the same to the extent they cover systematic violations.

The Court: By the same parties.

Mr. Goldstein: By defendants. However, the consent decrees do not even on the face go into individual problems of discrimination that members of Homestead Works would have—

The Court: Do you intend to go into individual matters of discrimination?

Mr. Goldstein: We intend to go into practices as they affect individuals or groups of individuals at Homestead Works. They may be a specific test that affects thirty people, not others.

The Court: Would it be proper for a class action?

Mr. Goldstein: Yes, sir.

Mr. Marcus: As far as Homestead workers are concerned.

The Court: You are going to 30 of one kind of discrimination, and with others into another?

Mr. Goldstein: The basic allegation is there are a number of discriminatory practices engaged in at United States Steel. Racial discrimination affects different people depending on the circumstances they are in. Those

practices may be stronger in one department than another. The company may have resolved some in one department and not another.

The Court: Didn't I suggest at the last conference we hold this in abeyance until January?

Mr. Marcus: No, Your Honor. It was that discovery should proceed and would end on January 15, 1975 at which time you would then rule on class determination. That was my clear impression.

The Court: We were going to hold everything in limbo until January 15th to find out what was going to happen in the south, and then we would see what we were going to do after we found out where we were.

Mr. Marcus: I'm sorry if I misunderstood. We would object to having to wait until January 15th.

The Court: That's what I said, and that's what I meant, and that's what I still mean. It seems to me to go forward in two different areas when it might be moot as a result of what might happen as a result of a consent decree is an unusual expenditure of money and a waste of your time and mine.

Mr. Goldstein: We would think it is just a total denial of due process to the plaintiffs, and the plaintiffs class.

The Court: To ask you to wait six months?

Mr. Marcus: For the defendants without notice to the plaintiffs to decide to take a case 1500 miles away away [sic] to another jurisdiction and purport to resolve that case there.

The Court: They didn't do that. That case was brought there. I said it, and I intend to live up to that.

We will talk about further discovery in January. I want to see what is going to happen there before we go forward with discovery on the matter.

Now, you want to communicate with named individuals who have contacted you. How did they happen to contact you?

Mr. Marcus: We have an affidavit that came in this morning from Mrs. Elizabeth Smith from the NAACP in support of this motion we are now discussing.

The Court: I asked how these individuals contacted you.

Mr. Marcus: My understanding is that these individuals contacted the NAACP who referred them to counsel for plaintiffs in relation to this specific claim and also as to their rights under the consent decrees. We also have a request by the local chapter to meet with that chapter during the week of July 7th, I understand now, to discuss these very same matters.

The Court: This affidavit by Mrs. Smith doesn't mention you at all, does it?

Mr. Marcus: No, Your Honor.

The Court: How did the six people happen to contact you is my question.

Mr. Marcus: I received a call from Mr. White and Mr. Frozer at my office requesting that I represent them and I met with the local chapter of the NAACP. Mr. Goldstein can speak for the contact with the NAACP directly.

Mr. Goldstein: Your Honor, Miss Smith referred the individuals to me, and Mr. White called my office in

New York City from Pittsburgh, and since I am associated with Mr. Marcus on a case, I asked Mr. White to give Mr. Marcus a call.

Mr. Scheinholtz: If I may be heard, I have several things. There are several aspects to this, Your Honor. First, there is and has been no class determination in this case, and until such time as there is a class determination it would seem to me that communications of this type are improper in any event.

The Court: Is it possible that these people want individual representation, because Mr. Goldstein's comments make me wonder if this is appropriate for class action.

Mr. Scheinholtz: Exactly. That's right. The Birmingham decree, even on his statement, certainly seemed to determine all or virtually all the class action allegations; for example, the testing is clearly covered by the Birmingham decree. Any form and manner of testing at the Homestead Works is covered by the Birmingham decree—

The Court: What he said was that there are various individual claims of various individuals and groups of individuals which wouldn't require class action at all.

Mr. Scheinholtz: I'm saying with respect to that that generally the manner of any testing is the subject of testing generally, and its application to individuals and groups of individuals is covered by the Birmingham decree.

Apart from that, if there are any individual claims to which he said the consent decree doesn't address itself, would't be subject to the class action.

The Court: There is nothing wrong with them contacting them under those circumstances.

Mr. Scheinholtz: That gets to my second point. Assuming that this might come within the scope of the class action, we don't know whether the NAACP solicited these individuals at the local level or they solicited the NAACP.

We know Mr. Goldstein got a call and referred them to Mr. Marcus. We don't know on the basis of these pleadings whether in fact their claims are individual claims or whether they are group claims on the basis of these pleadings. I can only surmise what they are really suggesting and asking for when they talk generally. They say general claim rather than specific claim; we have a specific individual problem that we want to talk to somebody about.

I can only assume on the basis of these pleadings that it relates to the class action allegations.

Finally, if you read the documents clearly and carefully, what they want to do is go out there and talk to these people and the NAACP chapter and class generally about the Birmingham decree for the purpose of opposing the Birmingham decree and trying to relate its impact on this case.

With respect to that, I can say to Your Honor that we are under very severe limitations on what we can say. The decree provides a specific vehicle by which information will be disseminated to the people under the affected class in the Birmingham decree. In the letter it says we advise of general rights is subject to approval by Judge Pointer. It will be furnished to you.

What Mr. Marcus was talking about is that we are going to furnish the communication to all judges who have any pending Title VII cases. If you have any problem or question about the letter after it has been approved by Judge Pointer, it seems appropriate that you would communicate with Judge Pointer.

That is the only way I think from a practical point of view any questions you have or any other informed judge regarding the communication could be resolved. We see no other way it could be resolved.

Finally, there will be a specific notice of rights communications to be addressed to the members of the class, and that will be subject to approval by Judge Pointer, and will be furnished to you for your review in the same procedure. The information which will be imparted to these people orally when they come in, if they have any questions will be reviewed and monitored by Judge Pointer, so that everything that we say, the defendants, although I don't mean to speak for Mr. Frankel, but this would be a joint undertaking by the defendants. Everything that we say with respect to the Birmingham decree will be carefully monitored for accuracy and to make sure it complies with the Birmingham decree.

Mr. Marcus would be under no such restriction. He would be free to say whatever he wanted to say because his remarks wouldn't be under supervision, and in that connection I might say that he will pursuant to our arrangements at the last meeting be furnished with a copy of these communications.

Mr. Marcus: I don't see how our motion to respond to a direct request by named individuals for representa-

tion and by the NAACP local chapter to be fully informed as to their rights can be governed by any provision in the consent decree, and I don't think it is intended to.

The Court: Do you want to withdraw your request for class action? You wouldn't have restrictions.

Mr. Marcus: No. I see. We filed this motion apart from the one to communicate with the class as a separate situation where individuals seek representation.

The Court: You said motion to communicate with members of the class.

Mr. Marcus: And another to named individuals.

The Court: And Homestead Chapter of the NAACP.

Mr. Marcus: Two distinct motions. We have a specific request for representation on the one aspect and the other to classwide representation in this litigation.

We have asked on behalf of ourselves and our right to practice law as well as those individuals' rights to have counsel of their choice.

We have raised constitutional questions concerning free speech and association in this motion for permission to communicate with the named individuals as well as the local chapter.

I feel they are distinct matters, and we are permitted one as well as the other. But while we are talking about the one, we can't be denied permission, and those individuals and the chapter denied information to their rights, and can pursue counsel of their choice.

Mr. Frankel: With respect to addressing the Homestead Chapter of the NAACP, the Homestead Chapter

obviously includes blacks who would be within the class that Mr. Marcus is seeking in this case. Our problem with that is that although I'm not accusing Mr. Marcus of doing that, if you allow people to address lawyers who are otherwise precluded from contacting members of the class, if you allow them to address an organization which includes members of the class, it seems to me that would be a device for avoiding the purposes of the local rule.

Now, we are under strictures that Mr. Marcus has insisted on, and if we have anything in our newspaper which refers to the consent decree and goes to the entire membership of the steelworkers, we show that to Mr. Marcus and he gets a shot at it in case it is improper and wants to bring it to the court. He is monitoring communications to all our members because that includes some members of the class.

He would not be under those circumstances. He could say that whatever you wanted to do to the class because the Homestead Chapter includes members of the class.

The Court: They want to discuss with the Homestead Chapter appropriate relief from discrimination at the Homestead Works in light of the consent decrees in pending litigation.

Mr. Frankel: And explain rights under the consent.

Mr. Marcus: I contend they are entitled to be informed to their rights.

The Court: I would want to talk to the judge who is concerned with the consent decree and get his views. So I'm going to take both these matters under advisement.

Mr. Frankel: I want to make one thing clear. We are not saying the NAACP send somebody else to talk to the Homestead Chapter, but the problem in this case having the attorneys in this case do that talking.

The Court: You have talked about constitutional questions or issues. Do you wish to submit a brief?

Mr. Marcus: We will be glad to do that.

Mr. Scheinholtz: We will reply.

The Court: You claim freedom of speech. That would be attacking the very basis of the rule, wouldn't it?

Mr. Marcus: Your Honor, while we have strong feelings about the local rule, we felt that Your Honor needn't get into that at all, although we feel that the rule—

The Court: You raised it.

Mr. Marcus: Because we felt the local rule itself applied to the classwide communication as distinct from the motion of communication to specific individuals in the local chapter.

The Court: There might be a difference, but I miss it. You submit a brief if you wish. And you may reply, Mr. Scheinholtz.

Mr. Scheinholtz: Yes.

The Court: How long do you need?

Mr. Marcus: Five days.

Mr. Goldstein: We are under a substantial time pressure, and black workers around the country—

The Court: Why?

Mr. Goldstein: Because there is going to be, if the decree goes ahead, a notice of rights then a notice of award of money which was agreed to—not between counsel for the black workers, but between the government and the alleged discriminators, and a release. The release purports to waive all claims. The black workers are going to get the release in the mail and have 30 days to make a very important and crucial and complicated decision, that is whether or not to take the money and run, so to speak.

The Court: You feel they shouldn't be able to pass on that without your help?

Mr. Goldstein: They should be able to have counsel of their own choice at a time to give qualified, intelligent advice concerning that waiver to the individuals because every person is going to get an individual notice.

The Court: You are asking me to do something without me talking to the judge down south. You are asking me to meddle in that case. I'm disinclined to do that.

Mr. Goldstein: We are preventing these individuals from communicating with us and to them about their claims of discrimination.

The Court: Is Mr. Scheinholtz right in that he and the attorneys for the union are precluded from doing the same thing?

Mr. Marcus: No.

The Court: From going to the NAACP or the union precluded from going to all the black employees of the United States Steel Corporation and telling them why they should accept this settlement?

Mr. Goldstein: They have represented to the court by a letter that they will show every notice of communication to the judge, Judge Pointer.

The Court: Without approval, can they do this?

Mr. Goldstein: They have represented they will not. The judge hasn't ordered that.

Mr. Frankel: We made that agreement here at Mr. Marcus' insistence. We are not able to orally communicate with respect to the subject of back pay. That was our commitment, and it was Mr. Marcus' insistence.

The Court: In this case?

Mr. Frankel: Yes.

The Court: Are they precluded and you not precluded?

Mr. Marcus: We have a specific request—

The Court: Answer the question.

Mr. Marcus: To the extent that they must submit it to me first. If that is considered exclusive, yes.

The Court: The only thing that stops communicating with members of this class is an order in this case or an agreement in this case?

Mr. Marcus: Neither.

Mr. Scheinholtz: Judge Pointer's final opinion took into consideration the letter which we submitted to him, no communication as to general rights can be disseminated to any member of the affected class until it is approved by Judge Pointer and is disseminated to each judge who has a pending Title VII case for his review and at least his tacit if not formal approval.

Number two, no notice specifically with respect to back pay can be given to any member of the affected class without such a similar review procedure.

We have also advised Judge Pointer that with respect to the oral presentation, however, we do it, that the format of that presentation would be subject to similar review. We have no right, and I don't think Judge Pointer would be shocked to learn that in addition to that we have other rights of communication generally with the members of the class because I do not think that is contemplated by the decree or his order.

Mr. Frankel: As far as explaining their rights to the affected class members under the decree, we will tell them what we intend to say orally to every black member and they will have their input.

Mr. Goldstein: We feel that there is a big difference between communication by counsel for the discriminators and communication by counsel who represent plaintiffs who are members of the class or other black steel workers seeking representation from them concerning their rights under the consent decrees.

The Court: All right. In other words, you think that you are not on the same footing.

Mr. Marcus: They haven't asked to talk to defendants' counsel, named individuals and local chapter have not requested discussion with defense counsel, and I think that is the major distinction.

The Court: I will take it under advisement. You said you would submit a brief within a week. Do you want longer?

Mr. Marcus: Time is of the essence.

The Court: As you see fit. How much time do you need?

Mr. Scheinholtz: Equal time.

The Court: Within two weeks, or as soon as you want. And you will have two after they have filed.

Mr. Goldstein: For clarification, is the Court's sole reason for not ruling on the discovery motion there is this pending consent decree in Alabama and the Court wants to see the results from that consent decree before ruling on further discovery on this matter?

The Court: You asked if that is the sole reason. That is a reason. Not the sole reason.

Mr. Scheinholtz: There are other reasons which I haven't gone into.

Mr. Marcus: We feel that the results of the entry of those consent decrees may not be known by January 15th in which case—

The Court: We will face it then.

Mr. Goldstein: We also feel that it is not proper to delay this action because another district court—

The Court: There is not the slightest possibility of getting this action disposed of here, anyway, by that time because of our commitments. Class actions by their nature are drawn out types of procedures. Therefore, to have six months to find out the effect of that decree doesn't seem to me to be unreasonable.

Mr. Marcus: Are we ordered not to continue with discovery until January 15th?

The Court: That is what I said. If we find there is a legitimate contention that we ought to have a class action, we will permit you to make that discovery.

Mr. Goldstein: It's difficult to know if there is a legitimate contention until you know the underlying facts.

Mr. Scheinholtz: Your Honor, as a superabundance of caution, in light of this discussion, if there is a July 7th meeting of the NAACP, is it that Mr. Marcus won't be present?

The Court: No question.

APPENDIX F

Transcript of Pretrial Conference in the District Court, July 19, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JIMMIE L. RODGERS AND JOHN A. TURNER,
Plaintiffs
vs.
UNITED STATES STEEL CORPORATION; LOCAL 1397, AFL-CIO UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA,
Defendants
Civil Action 71-793
July 19, 1974
Pittsburgh, Pennsylvania

BEFORE: HON. HUBERT I. TEITELBAUM, J.

TRANSCRIPT OF PRETRIAL CONFERENCE

COUNSEL OF RECORD PRESENT

JOHN H. GOODWORTH
Official Reporter
July 19, 1974
Pittsburgh, Pa.

The Court: We have two areas to cover. First, Judge Pointer has approved a letter to be sent to the employees of the Homestead Works. Is that correct?

Mr. DeForest: Yes, Your Honor.

Mr. Schnapper: That is overstating it. He has approved in a proceeding to which we weren't parties the

general form and question of what letter goes to Homestead Works to be referred to you.

The Court: By whom?

Mr. Schnapper: Judge Pointer.

The Court: I don't have anything to indicate that.

Mr. DeForest: We have stated to the Northern District of Alabama that we would submit to you any notices that would go regarding pending cases, and we have in this case a commitment with plaintiffs' counsel to submit to you any notices. I don't think it is accurate to say that Judge Pointer referred them to you.

The Court: Are there any changes in that letter to Judge Pointer?

Mr. Marcus: We have a request going to Birmingham today to revoke Judge Pointer's approval.

The Court: I understand that.

Mr. Schnapper: I take it that we also understand the approval was, as far as we were concerned, an ex parte proceeding. We weren't told that approval was sought, and we were not given a copy of the letter until it was over.

The Court: You are filing a motion with Judge Pointer regarding the letter?

Mr. Schnapper: And an outline.

Mr. Marcus: Our position is that Judge Pointer has referred these particular documents to you for your approval.

The Court: I haven't head anything from him, and if he were going to refer anything to me—

Mr. Frankel: Judge Pointer said that each judge before whom a private action was pending should receive a copy, and if he wanted to disapprove it, that was up to him or to that judge.

The Court: That's different than saying he referred it to me for approval. I am not inclined to change his letter at all. If he wants to do that, that is up to him.

Mr. DeForest: One other thing that I would [sic] the record to show, and that is we do not in any way concede to Mr. Schnapper's remarks there was any ex parte proceeding because, as you know, the legal defense fund and the intervenors were denied their right to participate further in the proceedings.

The Court: Ex parte or bi-parte is again not a matter for me to consider. That is a matter for Judge Pointer to consider, if it should be considered at all.

Mr. Marcus: We feel that the covering letter would go with the outline submitted as to the solicitation on the part of the defendants to potential class members in the Rodgers and Turner action as well as all other employees at the Homestead Works in an attempt to sell to these employees all the provisions of the consent decree without mention of the pending action in this district court. We feel that if the defendants are to be permitted to make this solicitation, surely at the very least we should be permitted to respond to requests from the employees for representation and counsel.

The Court: We are not there yet, are we?

Mr. Marcus: I am not sure.

The Court: You are leapfrogging.

Mr. Marcus: At the very least we ought to be given an equal right to communicate on the same terms as the defendants in the Rodgers and Turner action.

The Court: Wait until I get there, will you?

Mr. Marcus: Fine.

The Court: As to the letter to be sent to the Homestead Works, whether ex parte, or if there are to be any changes or additions made in it, and whether it should not be sent, I'm not going to pass on that. That is not an appropriate matter for me to decide. I won't pass on that.

Mr. Marcus: I would like to note on the record that we submitted a revised letter with additions to this Court.

The Court: Yes. I will order your revisions to be filed in the case.

Mr. Marcus: Thank you.

The Court: Now, as to the motions to certify questions to the Court of Appeals, in the exercise of what I consider to be sound discretion, that is denied.

As to the motion to communicate with the NAACP, that is denied at this time without prejudice to renewal of that motion at a time which would appear to be more appropriate to me.

Now, as to the motion to communicate with individuals who have requested that they discuss matters with counsel, that motion is granted. However, the previous order forbidding solicitation and requiring prior Court approval of all communications with any other individuals is left intact. You may talk to those six individuals, but you may not solicit anybody else, nor may

you make any communications with anybody else except pursuant to Court approval.

Mr. Marcus: Are we restricted to potential members of the class in Turner?

The Court: Sure. I don't have anything to do with contacting members who are not members of the class. I raise that in connection with a letter concerning Mr. Jones. He doesn't appear to me to be a member of the class.

Mr. Marcus: That's right.

The Court: If he is not, there is no restriction for you talking to people who are not members of the class. I wouldn't have jurisdiction over that, anyway.

Mr. DeForest: I would like to clarify one thing. I know there has been a number of papers filed in this case, and I would like to point out that only two individuals have contacted Mr. Marcus contrary to what might appear on the face of—

The Court: Six.

Mr. DeForest: I know it says six, but there are only two, Mr. White and Mr. Brozier, which is established through the affidavits filed in support of the memorandum. I would request that only Mr. White and Mr. Brozier be permitted to communicate with Mr. Marcus.

The Court: How did you get six?

Mr. Marcus: I stated in my motion that the two individuals that Mr. DeForest has identified contacted me on their behalf and on behalf of four other gentlemen who are also listed in the motion. They had specific

authorization from those gentlemen to so contact me, and they asked that I represent all of those individuals.

The Court: You file an affidavit with the Court by those two individuals stating that, and then you may contact the other four.

Mr. DeForest: Your Honor, I have one problem I would like it made clear that because I fear that we will have repeated situations where certain persons will call and claim they represent nine, ten, or twenty persons, and then accordingly Mr. Marcus may communicate with them. Is that right?

The Court: No. He may not communicate with anybody beyond the two plus the four after the filing of the affidavit.

Mr. Marcus: Unless I seek further approval of the Court.

The Court: We will see what happens.

Mr. DeForest: Woud the Court be amenable that Mr. Marcus contact the other four if each called individually and stated—

The Court: Or by the filing of an affidavit stating they want to see him.

Mr. DeForest: That would be better.

Mr. Marcus: I am a little confused. Do you want an affidavit of the two individuals stating that they represent the other four?

The Court: And the four individuals stating that, that is correct.

Mr. Marcus: I can't get an affidavit if I don't communicate with the other four.

District Court Transcript, July 19, 1974.

The Court: You may communicate to the extent to ask for such an affidavit. If that is filed, then you may communicate with them. In other words, I don't want to set up a system of runners here.

Mr. Marcus: Neither do I.

The Court: So I will limit it to the two plus the four with those affidavits, but before you talk to them about the merits, I want you to have the affidavits and file them.

Mr. DeForest: Would you entertain a specification in these orders that you are now entering prohibiting any of the six individuals with whom Mr. Marcus has filed this motion to communicate as well as Turner and Rodgers, as well as any members of Mr. Marcus's firm, or the legal defense fund, or the NAACP, prohibiting all those persons from referring to Mr. Marcus any individuals requesting that any individuals contact Mr. Marcus?

The Court: Let the people do this on their own. I can't do that. In other words, the additional people would have to do that on their own. We don't want to make a mistake about that. If there is any indication that these people are soliciting in that regard, that is barratry, and I will refer it to the District Attorney of Allegheny County. If there is any indication that counsel is doing that, I will refer it to the Disciplinary Committee. I don't want that, and I can't overemphasize that, so if individuals do it, I will refer it to the District Attorney, or you may, Mr. DeForest. If there is any indication of counsel doing it, we will go to the Disciplinary Committee.

Mr. DeForest: To make it clear so there is no misunderstanding later, your prohibition would include the NAACP referring individuals to Mr. Marcus?

The Court: Well, if people want to come to see Mr. Marcus, I don't intend to stop them from doing that. Before he may contact them, though, I want affidavits from them stating, inter alia, how they happened to contact him.

Mr. Marcus: We may contact them to that extent to get that affidavit?

The Court: If they contact you first.

Mr. Marcus: If they contact me first.

The Court: And I would want an affidavit saying they did contact you, that they do want to do that, and how they happened to do that. My restriction applies to the NAACP, too. I don't want the NAACP running clients for Mr. Marcus.

Mr. Schnapper: I take it that you are not ordering the NAACP, which isn't here technically, that if someone came and said, "I have a problem. What should I do?"

The Court: I'm not restricting that if they do that on their own, but if they don't do it on their own, I don't want the organization to suggest to people that they should have a problem or seek counsel.

Mr. Schnapper: Of course. We don't intend that.

The Court: I would like this action to proceed with reasonable dispatch in Judge Pointer's court to see what happens there, without any monkey wrenches being thrown in the machinery. I don't want people solicited

nor running by organizations, by counsel, or by runners. I want this to be restricted to people we have and anybody else who, on their own, happens to do this.

Mr. Marcus: Your Honor, I wonder if we could suggest an alternative since this is your main concern in dealing with this problem of equal time and communicating with respect to matters that the defendants are being permitted to communicate, and that is, if we will agree not to represent in any action, other than a class action that may be pending, those individuals who would like us to discuss the consent decrees or the pending litigation with them, would that be satisfactory to do this?

The Court: That is exactly what I don't want. That is exactly what I do not want.

Mr. Marcus: This avoids any solicitation and barratry where we agree in advance not to represent them.

The Court: That is worse than enabling people to go to an alleged interested party and attempt to sabotage the settlement in Judge Pointer's court, and I don't want that to happen.

Mr. Schnapper: I think that Mr. Marcus's question reflects a more basic concern about what it is that the defendants are asking permission for.

The Court: They are asking Judge Pointer's permission, not mine.

Mr. Schnapper: Then I understand that there is a gag rule to which they need an exception if they want to talk to members of the class.

The Court: If Judge Pointer will authorize you to send out a letter, I have no objection.

Mr. Marcus: Or to communicate with any member of this class.

The Court: I have no objection if he does it. I am not going to do it myself. That is what I'm saying. If Judge Pointer wants to do it, the case is with him, and he is far more familiar with the people to explain why the people shouldn't approve the settlement by solicitation, by letter, orally or any other way.

Mr. Schnapper: That is the problem we will take up with him.

The Court: I don't want to be a side agent operating at the side affecting something before another judge.

Mr. DeForest: In order that the record might reflect what has been discussed, you are not referring these questions to Judge Pointer, is that correct?

The Court: I am not.

Mr. Marcus: You are deferring them.

The Court: I'm not deferring them. That would be presumptuous. It is his case , and whatever he does with it is all right with me even though it has an indirect effect on the case before this Court. I consider that to be the controlling case, not the one here in Pittsburgh.

Mr. Schnapper: As to any disagreements we may have as to the notice or requests, that will be taken up with Judge Pointer.

The Court: Exactly. His case controls this situation. I don't want to do anything in any way to affect it. All I'm suggesting is that we are not talking about the merits. I'm saying this is more proper for Judge Pointer.

Mr. Marcus: I assume, also, about the tender of back pay, there is no sense bothering Your Honor with that issue when you ruled that everything would be deferred to Judge Pointer, and that would be, also.

The Court: It may control this case, and I don't intend to interfere a bit. I defer to him. I don't want to do anything.

Mr. Frankel: Consistent with our commitment, we are going to submit to you the tender and any other documents that go out in connection with back pay. We must do that under the consent decree, anyway.

The Court: Under his consent decree in that Court.

Mr. DeForest: Your Honor might be interested in any aspects of notices that relate to the present litigation of Rodgers and Turner, for example.

The Court: Sure.

Mr. DeForrest: And any matters relating to this litigation, we presume.

The Court: If it has any effect on the litigation before Judge Pointer, I will defer it, not pass on it.

Mr. DeForest [sic, actually, *The Court*]: Anything affecting the Pittsburgh litigation which appears to me to affect the litigation before Judge Pointer, I will postpone action on it until a more appropriate time so as not to affect anything before him.

Mr. Schnapper: There are two supplementary things to be raised. First, we are filing today an appropriate motion to Judge Pointer about notices. I take

it that the notices in fact will not be sent to workers at the Homestead Works until that question has been resolved before Judge Pointer.

Mr. DeForest: No. I think we should state for the record that these matters are before Judge Pointer, and I believe that if Judge Pointer does not stay the sending of these notices, that pursuant to his direction we will send them to the Homestead Plant.

The Court: If he doesn't stay them, of course.

Mr. Marcus: Under the present ruling, will you allow us at least today to have our motion filed and let Judge Pointer decide whether he wants to put an immediate stay on it? They could run out after this conference and mail their notices. If they will agree —

Mr. DeForest: I can solve the problem. The defendant, United States Steel Corporation, will agree that it will not mail today the notices. Any further stay would have to be granted by Judge Pointer.

Mr. Matera: That is not so much of an agreement but a form of statement of what our plan is such that the mailing cannot occur prior to about the 24th.

The Court: Will the corporation state for the record that they will mail out those notices until Judge Pointer has had a chance to pass on the stay order?

Mr. Matera: I don't know about that.

Mr. DeForest: I think that if the papers are filed today with Judge Pointer, the matter is within his jurisdiction, and he should appropriately control it. We can state for the record that because of the administration of mailing these, we will not mail them today, and it will be a matter before Judge Pointer.

District Court Transcript, July 19, 1974.

The Court: What if Judge Pointer is not there today? I'm suggesting to you that you should not mail any notices out until Judge Pointer has had an opportunity to consider it. Once he has had an opportunity to consider it, unless he stays it, of course, you can send it out.

Mr. Stoner: What if they don't file the papers today?

Mr. Marcus: It would be only because of a plane crash on which that pleading is being sent.

The Court: We know what we are talking about.

Mr. Matera: This motion doesn't just go to Rodgers and Turner, but all actions throughout the country affected by the consent decree.

Mr. Schnapper: All plants affected, whether private actions or not. In any event, I have to say there may be questions we intend to raise here that are not in the papers but in Washington, and I have to check on that by telephone. We will see that all problems here are raised.

Mr. Matera: I am wondering if we are under some inhibition —

The Court: Don't send these notices to anybody in Western Pennsylvania until the matter is brought to Judge Pointer's attention.

Mr. Frankel: To the Homestead people and —

The Court: Of course, those in this case. We don't have to do with everybody in Pennsylvania. But nobody connected with this case will receive notice until the matter is brought to the attention of Judge Pointer, and, of course, he will do with it as he wishes.

Mr. DeForest: We have no problem with that.

The Court: But that is based on an understanding by you that you will bring that to his attention promptly. I don't mean this to be an indefinite stay.

Mr. DeForest: What if they file their papers in three or four days?

The Court: I said promptly.

Mr. DeForest: By Monday.

Mr. Marcus: I have no problem with that.

The Court: I want the papers filed by the next time Judge Pointer is available in his chambers in Alabama.

Mr. Marcus: We can have an agreement on the record it will be no later than Monday.

Mr. Matera: We will not mail notices before next Wednesday. We couldn't physically do it.

Mr. Schnapper: Why don't we tell Judge Pointer that is when you want to mail notices so he understands?

Mr. Frankel: What is true at this plant may not be at another plant.

The Court: As far as the Homestead Plant is concerned, the notices will not be sent out until next Wednesday. They may be sent out after next Wednesday if Judge Pointer doesn't stop it.

Mr. DeForest: On or after next Wednesday.

The Court: Is everybody in agreement?

Mr. DeForest: Yes.

Mr. Marcus: Yes.

Mr. Schnapper: Yes.

Mr. Frankel: Do you think we should have an order drafted?

The Court: The transcript will be the order of this Court.

Mr. Matera: We have an agreement on your statement that you are not allowing any changes in the letter or order.

Mr. Schnapper: There is one other matter. I think there is some confusion about this question. In view of your indication that you think it appropriate that problems which may come up about Homestead be resolved before Judge Pointer, I wonder in the future that any matter presented by the company or the union to Judge Pointer which might have some effect on Homestead, that copies of those things will be served on us so we are not in the situation of finding out after Judge Pointer approved something and having to run back afterwards and object to it

Mr. DeForest: Your Honor, I assume you are only talking about notices that are going to be mailed to the Rodgers and Turner class, and that is the only thing covered by the local rule.

Mr. Schnapper: Well, I can't anticipate what else you might do before Judge Pointer about Homestead.

Mr. Matera: You could take the position that anything we do under the consent decree could have some effect on the Rodgers and Turner case.

Mr. Schnapper: Not to disrupt it, but I am asking for copies of the papers.

Mr. DeForest: You are applying the request under the local rule. It applies to communications to class members. Accordingly, I am only willing to discuss with you those matters. Now, what is your request?

The Court: He wants copies of any papers you file with Judge Pointer to be given to them which affect the class.

Mr. DeForest: Which constitutes a notice to be mailed in Rodgers and Turner?

Mr. Schnapper: My request is broader than that. If you wanted for purposes of discussion to narrow it to notices, we would request all papers affecting this case, and I understand you are not acceding to that, but within that request we ask for copies when you propose the notice that goes to the Rodgers class, and we would like to receive a copy of that proposal so we can comment on it before Judge Pointer has approved it.

Mr. DeForest: Judge Pointer has to grant that right.

Mr. Marcus: Our position is that we would come back here and ask Judge Teitelbaum to stay any notice affecting Rodgers' and Turner's class before going to Judge Pointer to resolve it.

Mr. DeForest: I disagree. These matters are within Judge Pointer's supervision, according to Judge Teitelbaum. If you should feel you should have rights to access to the notice, request it from Judge Pointer.

The Court: That's right.

Mr. Marcus: I would ask Judge Teitelbaum for a ruling on that issue.

The Court: If notice is filed for approval by Judge Pointer, then you should ask Judge Pointer to tell them to direct that you get copies of it rather than me directing that.

Mr. Schnapper: If we are going to possibly be forced to object only after the fact, will you at least tell us what Judge Pointer has done before it is acted upon? I don't want to find out a month after the notices go out.

Mr. Frankel: We are committed to give you advance copies of anything.

Mr. DeForest: You would receive them in this case.

The Court: As a practical matter, when Judge Pointer approves it, they would come to me, anyway.

Mr. Schnapper: And we would be running back.

The Court: See Judge Pointer if you have objections. When it comes to me, you will get them, and then you can object. But Judge Pointer controls it rather than me. If we reach a point on which the consent decree raises or falls having further to do in our case, then I'll have to pass on it, but not at this stage.

Mr. DeForest: So the record may be complete, I would like to advise the Western District as well as counsel for the plaintiffs that in xeroxing the cover letter to be sent to Homestead employees, there were four words not picked up by the xerox machine. It is the sixth paragraph of the letter I submitted to Mr. Marcus, and the sentence should read, "The Homestead Works operation and the Homestead Works-Carrie Blast Furnaces operation have been combined for purposes of the seniority provisions of the Decree."

The Court: That completes everything before me today.

APPENDIX G

Written Order of the District Court, September 12, 1974

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JIMMIE L. RODGERS and JOHN A. TURNER,
Plaintiffs
v.
UNITED STATES STEEL CORPORATION; LOCAL 1397, AFL-CIO UNITED STEEL WORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants

No. 71-793
CIVIL ACTION

Memorandum Order

The gist of the issue before the Court in this case concerns the efforts of counsel for named plaintiffs to contact other prosective members of the proposed class in order to discuss the terms and scope of a consent decree settlement which resolved the issue of employment discrimination in the steel industry and which was entered into by representatives of the United States Government, the United Steelworkers of America and the major steel producers in this country. Defendants contend that the effect of plaintiffs' counsel's efforts will be to sabotage this settlement entered into before the Honorable Sam C. Pointer, Jr., United States District Judge for the Northern District of Alabama earlier this year. Plaintiffs contend that their aim is educative only

and argue that no countervailing consideration is sufficient to outweigh their right to contact prospective class members.

Throughout this litigation my attitude has been to broach no interference with the ongoing process which is taking place in Alabama. As long as it appears that the Alabama settlement has the potential to eliminate all disputes between all the parties, and thus the potential to eliminate the need for litigation in this forum, I see no good reason to interfere with that process. Plaintiffs' best argument in support of their motions (each of which, it might be noted, has been directed in one way or another toward their ultimate goal of getting this court to permit them to proselytize before minority steelworkers) is that no harm could come of it. Defendants vigorously argue that a great deal of harm—in the form of delay, confusion, and increased litigation—could come as a result of plaintiffs' interference. I agree with defendants' position. The administration of the Alabama settlement, which is mammoth in its scope and exhaustively detailed in its specifics, is simply not amenable to the type of participatory democracy which plaintiffs envision. See in this regard *Aikens v. Abel,* 373 F. Supp. 425 (W. D. Pa. 1974).

Thus, for the reasons set out above, on June 27, 1974, I ruled that this case would be continued until January 15, 1975, with discovery to be held in abeyance, in order to permit the Alabama settlement process to reach its ultimate conclusion. In so ruling, I thereby denied plaintiffs' renewed motion for class determination and renewed motion to compel discovery, which had been filed previously. Plaintiffs' motion for permission to communicate with named individuals and to meet with the

Homestead chapter of the NAACP and to communicate with members of the proposed class (Motions to communicate), was taken under advisement at that time.

On July 8, 1974, plaintiffs filed a motion to certify questions and for a stay pending appeal. This motion was apparently directed at the prior rulings of the Court made on June 27 and made in anticipation of this court's denial to plaintiffs motions to communicate.

On July 19, 1974, I orally denied on the record plaintiffs' motion to communicate, after granting plaintiffs' counsel permission to communicate with certain named individuals, provided certain affidavits were filed.

AND NOW, to wit, this *12th* day of September 1974, IT IS ORDERED that plaintiffs' motion for a stay of the above orders be and the same is hereby denied. Ordinarily, a party requests a stay when he is ordered by a court to perform some affirmative act, such as reporting for detention or paying damages. Here, the effect of my previous orders is clearly to deny plaintiffs' counsel the ability to perform certain acts—i.e., communicating with those certain specified individuals. Thus, it becomes self-evident that to stay the above enumerated orders would be to negate their effect. Plaintiffs' motion for a stay must be denied.

HUBERT I. TEITELBAUM
United States District Judge

APPENDIX H

Statute and Rules Involved

28 U.S.C. §2071, 63 Stat. 104, reads as follows:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 23(d) of the Federal Rules of Civil Procedure reads as follows:

"(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural mat-

ters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time."

Rule 83 of the Federal Rules of Civil Procedure reads as follows:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Local Rule 34(d) of the United States District Court for the Western District of Pennsylvania reads as follows:

"In any case sought to be maintained as a class action:

* * *

"(d) No communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the Court approving the Communication."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1483

UNITED STATES STEEL CORPORATION,

Petitioner,

v.

JIMMIE L. RODGERS and JOHN A. TURNER,

BRIEF IN OPPOSITION TO CERTIORARI

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BRIEF IN OPPOSITION TO CERTIORARI

Opinion Below

The opinion of the Court of Appeals for the Third Circuit dated January 24, 1975, is reported at 508 F.2d 152.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether the court of appeals was correct in issuing a writ of mandamus and/or prohibition in an employment discrimination case to strike down a local rule and district court orders which for three years prevented civil rights lawyers from talking with black steelworkers who were potential class members and prohibited the lawyers from meeting with an NAACP branch which included potential

class members, where the district court had not even determined if the case could proceed as a class action, either

1. On the ground that such restraints on free speech were not authorized by statute and imposed unreasonable conditions upon the availability of class actions which were inconsistent with Rule 23, Federal Rules of Civil Procedure and with Title VII of the Civil Rights Act of 1964; or

2. Upon the ground that the local rule and orders of court violated the First Amendment rights of plaintiffs and their potential class members and lawyers to freedom of speech, freedom of association, and privacy of association, and also violated their rights to freedom from discriminatory or censorial regulations of their speech and associations, as well as violating the right to counsel.

Statutes and Rules Involved

The case involves Local Rule 34 of the United States District Court for the Western District of Pennsylvania, which provides in part:

> Rule 34. Class Actions.
>
> In any case sought to be maintained as a class action.
>
> * * *
>
> (c) Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, Federal Rules of Civil Procedure, as to whether the case is to be maintained as a class action. In ruling upon such a motion, the Court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postpone-

ment of the determination pending discovery of such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the Court for renewal of the motion before the same judge.

(d) No communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the Court approving the communication.

Statement

Respondents Rodgers and Turner are black steelworkers employed at United States Steel Corporation's Homestead Works. They brought this employment discrimination case in the United States District Court for the Western District of Pennsylvania in August 1971, against the steel company and the local and national unions representing workers at the plant. The complaint alleges a pervasive pattern of racial discrimination by the defendants in violation of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. § 1981, and requests injunctive relief and back pay for the named plaintiffs and a class of more than 1,200 black workers employed at Homestead Works. As the opinion below explains, notwithstanding the fact that early in the case the parties stipulated the definition of the class involved, the district court has not yet ruled on plaintiffs' repeated motions that the case be certified as a class action. 508 F.2d at 155.

This petition involves a collateral issue not dealing with the merits of plaintiffs' job discrimination claim which has

not yet been tried or decided. This phase of the case deals with the fact that the district court by rule and orders prevented plaintiffs' lawyers from talking with any of the black workers at Homestead Works for three and a half years until the court of appeals issued its writ of mandamus and/or prohibition.

Plaintiffs' local attorney is Bernard D. Marcus of the Pittsburgh firm of Kaufman & Harris. He has associated with him in the case several lawyers employed by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., a non-profit corporation which has furnished legal aid in civil rights cases in state and federal courts for thirty-five years. The Fund is a New York corporation, approved to function as a legal aid organization. Neither Mr. Marcus nor the Legal Defense Fund lawyers have accepted or expect any compensation from the plaintiffs, or from any member of the potential class. Mr. Marcus and his firm will be compensated only in the event attorneys fees may eventually be taxed against the defendants by the court as authorized by Title VII, 42 U.S.C. § 2000e-5(k). Any fee which might be awarded by the court on account of work done by Legal Defense Fund employees will be paid to that non-profit corporation and not to the individual salaried staff attorneys.

For over three years from the filing of the suit until the decision of the court of appeals, plaintiffs' attorneys were forbidden from communicating with class members by Local Rule 34(d) and several orders issued to enforce that rule.

Plaintiffs' attorneys first sought permission to talk with class members by motion filed September 21, 1973. The motion alleged that plaintiffs' ability "effectively to present the claims of class members, to discover the case, and to define the scope of the issues with greater specificity de-

pends in significant part on their having access to class members, to investigate their complaints, and to supplement the available defendants' documentary materials by interviewing their employees." Plaintiffs asked for a general order "allowing proper communications" and stated that "It would be impractical and unworkable for plaintiffs to reapply specifically for permission to communicate with particular class members."

At a hearing on September 29, 1973, the court denied the motion:

> THE COURT: The ruling of the Court is that they can't contact people who are not named as parties until an order of Court. No person is to be contacted without my permission. As to the specific individual concerned after giving notice to the defendants who the individual is and what you expect to learn from him, then we can determine whether this is sufficient reason to change the general rule.
>
> The transcript of this conference will take the place of and will be considered the order of this Court, no written order being necessary by agreement of all parties. (App. 85a-86a)

Plaintiffs made a further effort to get permission to talk with potential class members in June 1974. In the background of this second effort was a related development which had occurred in the Northern District of Alabama, where on April 12, 1974, the court had approved two consent decrees in a suit by the United States against nine major steel companies, including United States Steel, and the United Steelworkers of America, AFL-CIO. The consent decrees, approved on the same day the Alabama suit was filed, purported to be a nationwide settlement of all race and sex discrimination claims in the steel industry,

including claims at Homestead Works.[1] The consent decrees changed seniority practices at steel plants such as Homestead Works, and provided a back pay remedy for certain black employees. The consent decrees provide for communication to black class members by the defendants and the solicitation of waivers of Title VII claims in order for them to receive back pay.

Plaintiffs in the *Rodgers* case, who had been prevented from communicating with class members since suit was filed in 1971, again moved in April 1974 for a class certification and proposed that the court sign a notice to class members explaining the status of the case. Plaintiffs moved for an order prohibiting the defendants from soliciting releases from class members, but withdrew this motion when defendants agreed at the hearing to show plaintiffs' counsel written communications in advance and afford plaintiffs time to apply for a protective order if counsel objected to any communication.

On June 26, 1974, plaintiffs moved for permission for their counsel to talk with six named class members and to attend a meeting of the Homestead Branch of the NAACP. The moving papers explained that two of the six workers had sought information and assistance about employment discrimination from the Assistant Labor Secretary of the NAACP in New York, and had been referred by her to the Legal Defense Fund attorneys. The Homestead Branch of the NAACP had independently invited the plaintiffs' attorneys to come to a branch meeting to discuss discrim-

[1] The legality of the consent decrees was promptly challenged by black workers from various states (including Rodgers and Turner) who intervened in the Alabama case. The case is now pending in the Fifth Circuit on the appeal of those intervenors from an order rejecting all challenges to the consent decrees. *United States* v. *Allegheny-Ludlum Industries*, 5th Cir. No. 74-3056.

ination at Homestead Works. The motion pointed out the nature and purposes of the NAACP and explained the circumstances of the invitation which included a request for information about the Alabama consent decrees and the pending local litigation. The motion alleged specifically that a denial of the right to communicate would violate constitutionally protected rights of free speech and association as well as the right of counsel to practice law. The motion relied on *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963), and a series of succeeding cases.

On the same date, June 26, plaintiffs filed a related motion entitled "Renewed Motion for Permission to Communicate with Members of the Proposed Class" (App. 166a-170a). The latter motion pointed out that the court had set January 15, 1975, as the deadline for completion of discovery; that under the prior orders of court counsel were unable to communicate with class members for discovery purposes, that plaintiffs had undertaken a great deal of time-consuming and costly computer analysis and discovery of defendants' records and now needed to talk with members of the class in order to effectively present their claims, to define the issues and complete discovery, and that it was impractical and unworkable for plaintiffs to apply specifically for the right to communicate with particular class members. The motion alleged also that it was inequitable to prohibit communication by plaintiffs while the defendants could communicate with the class pursuant to the consent decrees to offer them back pay and seek to persuade employees to execute releases waiving their rights.

At a hearing on the motion on June 27, 1974, the court orally forbade plaintiffs' attorney from attending an NAACP meeting scheduled for July 7, and reserved decision pending briefs on the constitutional issues. The court

also stayed all discovery and a class determination until January 15, 1975. Plaintiffs then moved for entry of a written order embodying these rulings and for a certification to permit an interlocutory appeal. On July 19, 1974, the court orally denied the certification and the motion to communicate with the NAACP. The court granted the motion to talk with the six workers, but when U. S. Steel's attorney pointed out that only two of the six had contacted the New York office of the NAACP, the court ruled that counsel could speak with them or any other class members only if they first filed in court the class members' affidavit stating how they happened to consult counsel. The court's oral ruling is quoted in the opinion below, 508 F.2d at 157-158.

Judge Teitelbaum made it clear that the prior restraint was not merely to prevent solicitation and "barratry." When Mr. Marcus asked the court if he and his colleagues could attend the NAACP meeting if they would agree not to represent any of the workers there, except in the pending class action, the court "made clear that its purpose in continuing the ban on communication was to prevent discussion of the Alabama consent decree" (508 F.2d at 158). The purpose of the restriction on communication was to prevent what Judge Teitelbaum called "sabotage" of the Alabama consent decree (508 F.2d at 152). Although plaintiffs requested written orders, none were filed.

Plaintiffs filed an appeal and a petition for a writ of prohibition or mandamus with respect to those orders, and also sought a stay pending the decision of the court of appeals on the merits. When the stay was denied without prejudice for lack of a district court order giving reasons for its action, plaintiffs again applied to the district court for a written order—which was finally forthcoming on

September 12, 1974, embodying the June 27 and July 19, 1974, oral rulings.

On January 24, 1975, the court of appeals issued a writ of mandamus or prohibition with respect to the orders restricting communications. In its opinion the court of appeals observed that the district court had superimposed a condition on the availability of the class action device that raises serious First Amendment issues:

> . . . The two provisions make clear that the District Court for the Western District of Pennsylvania has superimposed upon Rule 23 a condition that the class action device be available only to those plaintiffs willing to submit to an assertion of a dual power by the court—the power to postpone class action determination and to impose a prior restraint in the meantime. That the prior restraint may be of extended duration is clear; in this case it has continued for more than three years.
>
> The imposition of such a condition upon access to the Rule 23 procedural device certainly raises serious first amendment issues. . . . There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Inc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination. See, e.g., *United Transportation Union* v. *State Bar*, 401 U.S. 576 (1971); *NAACP* v. *Button*, 371 U.S. 415 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. See *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941).

> Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. See T. Emerson, *The System of Freedom of Expression*, 449, *et seq.* (1970). (508 F.2d at 162-163).

However, the court of appeals found it unnecessary to rest its decision on First Amendment grounds, because it concluded that the district court had no statutory authority to promulgate Local Rule 34(d) which it found to be inconsistent with the policy underlying Rule 23 of the Federal Rules of Civil Procedure. The Third Circuit noted that the district court was seeking to prevent "barratry"; that the policy of Rule 23 was "in favor of having litigation in which common interests or common questions of law or fact prevail, disposed of where feasible in a single lawsuit"; that there was no federal common law offense of barratry; and that even if the federal rules and statutes were construed to authorize the adoption of local rules for controlling barratry, a serious "constitutional issue of overbreadth would be presented by the Local Rule in its present form." (508 F.2d 163-164). The court went on to state:

> The rule imposes a prior restraint on all communication, not merely communication aimed at stirring up litigation. Think what our reaction would be to a state statute which required that attorneys submit all communicatons to be made to persons not yet their clients to the prior approval of a court. (508 F.2d at 164)

The court then concluded that Local Rule 34(d) was outside the rule-making power granted to the district court. The majority found it unnecessary to decide

whether a local rule regulating communications "after a class determination has been made," would be valid but pointed out that drafting such a rule would require "careful consideration of overbreadth." 508 F.2d at 164.

The court noted that Local Rule 34(d) was adopted in response to a suggestion in the *Manual for Complex Litigation*, see 1 Moore, Federal Practice ¶ 1.41, at 27-32 (2d Ed. 1974, part 2). The court below noted that Local Rule 34(d) contains none of the exceptions recommended in the *Manual*. In any event, the court of appeals made it plain that it had no occasion to rule on whether the suggested Local Rule 7 in the *Manual* contained sufficiently specific exceptions to avoid the overbreadth problem. 508 F.2d at 164-165, note 18.

Judge Weis filed a concurring opinion which agreed that Local Rule 34 should be set aside "not, however, because of the time period in the litigation, but, rather because it is overbroad in its wording." Thus Judge Weis did reach the constitutional question and decide it in plaintiffs' favor saying: "Accordingly, it seems to me that local Rule 34, as it applies to civil rights actions, must be set aside as being unnecessarily broad." 508 F.2d at 166.

The court of appeals, and this Court, denied motions by U. S. Steel for a stay pending certiorari. —— U.S. ——, 43L.ed.2d 649. After the district court vacated its prior orders, plaintiffs' attorneys finally met with the Homestead Branch of the NAACP and discussed racial discrimination problems at Homestead Works with black steelworkers.

Argument

This case does not warrant review on certiorari because the decision of the court of appeals is in accord with this Court's prior decisions, and there is no conflict among the circuits on the questions presented. The decision of the Third Circuit, which set aside the trial court's across-the-board prior restraint of all communications between plaintiffs' attorneys and the potential class of black steelworkers, is entirely supportable on a number of grounds. The result is plainly correct because the district court's rule and orders were inconsistent with Rule 23 of the Federal Rules of Civil Procedure, with Title VII of the Civil Rights Act of 1964, with the First Amendment's guarantee of freedom of speech and association, and with the right to counsel. In the factual context of the case the district court's rulings were discriminatory, censorial and inequitable in the treatment of plaintiffs vis-a-vis the defendants.

1. The local civil rule and orders of the district court were in conflict with Rule 23 of the Federal Rules of Civil Procedure.

The court below properly concluded that Local Rule 34(d) and the orders implementing that rule in this case, which were ostensibly designed to supplement Rule 23 of the Federal Rules of Civil Procedure, were actually inconsistent with the policy underlying Rule 23. As the court below analyzed the case, the district judge had asserted a "dual power . . . to postpone class action determination [for an extended period] and to impose a prior restraint in the meantime." 508 F.2d at 162. Local Rule 34(d), as Judge Gibbons observed, "imposes a prior restraint on all communication, not merely communication

aimed at stirring up litigation." 508 F.2d at 164. The Third Circuit acknowledged that district courts had some powers to regulate communications and referred to "the undoubted power to impose some restrictions on first amendment rights during the course of judicial proceedings." 508 F.2d at 162. But the court found no authorization in the statutes or rules for a trial court to condition the availability of the Rule 23 class action device upon a litigant's submission to an indefinite period of prior restraint on all communications about the case.

The court noted the injustice of imposing a restraint on speech in order to prevent abuse of the class action device, where the court indefinitely delayed a decision about whether the class action procedure could be employed in any event. It was in this context that the court made a distinction between the role of a court in imposing restraints before and after class certification. If class representative status was eventually denied the years of imposed restraint on free speech would have been imposed for naught. The court of appeals found it improper to delay class certification while imposing a broad gag rule as a condition to seeking representative status.

The court of appeals also noted that while the prevention of "barratry" and "solicitation" (cf. *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963)) was one proffered justification for the trial court's rulings, the ban was in no way limited to communications which might fit within those general rubrics. Plaintiffs' attorneys were forbidden to interview workers while investigating the case and gathering witnesses and evidence unless they first obtained the court's permission for each interview by making a showing of what they expected to learn from each worker. Plaintiffs' attorneys, some of whom were employed by a civil rights

organization, were forbidden from attending a meeting of the Homestead Branch of the NAACP because some potential class members would attend the meeting. The prohibition against attending the NAACP meeting forbade mere presence at the meeting. Plaintiffs' counsel would have been in violation of this order if they had attended the meeting without speaking at all, if they attended and spoke only of unrelated subjects, if they spoke about the case only in the most restrained and proper manner, if they distributed copies of relevant court papers or orders, or if they merely gave an abstract explanation of Title VII of the Civil Rights Act of 1964. The court of appeals was entirely correct in finding no authority to impose such restraints on free speech and association conferred by the general grant of authority to make rules of practice "not inconsistent with" the Federal Rules of Civil Procedure.

In any event, the Third Circuit concluded that the orders and rule of the district court were inconsistent with the policy of Rule 23 of the Federal Rules of Civil Procedure which is "in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit." 508 F.2d at 163. The court perceived the district court's ruling as preventing the full implementation of the policy of Rule 23. That conclusion is entirely reasonable because lawyers subject to the district court's restraints are quite evidently hobbled in carrying out the obligation to fairly and adequately represent the class. A lawyer conscientiously engaged in representing a large class of workers would want to learn their grievances and concerns by personal interviews, and would want to respond to inquiries by class members. The duty of fair representation probably encompasses some obligation of responsiveness to concerns of class members who are not named plaintiffs.

It certainly encompasses an obligation to fully investigate the facts of racial discrimination suffered by the class in order to adequately litigate the merits of the case. It is fair to conclude that the restraints imposed by the district court on plaintiffs in this case so hamstrung their presentation of the case as to conflict with the policy of Rule 23 supporting class actions.

2. The district court's rulings conflicted with Title VII of the Civil Rights Act of 1964.

The arguments that the district court exceeded its authority by rulings conflicting with the principles of Rule 23 have added force in the context of a fair employment suit brought under Title VII of the Civil Rights Act of 1964. As this Court held in *Albermarle Paper Co.* v. *Moody*, —— U.S. —— (decided June 25, 1975), Congress intended that Title VII plaintiffs have the benefit of the class action device, for backpay claims as well as for injunctive relief. Title VII suits are encouraged by statutory provisions for the award of counsel fees to successful plaintiffs who vindicate the public interest in eliminating discrimination. *Albermarle Paper Co., supra.* The rules and orders of the district court restraining communications were all the more inappropriate in a case such as this where plaintiffs' attorneys were charging the class members no fees, offered to agree not to represent any more clients among the class members, and were entirely dependent upon the court itself to determine any fee they might obtain if they eventually won the case on the merits.

3. Local Civil Rule 34(d) violates the First Amendment.

The trial court imposed unconstitutional prior restraints on free speech and association in violation of the First Amendment. The decision of the court of appeals, while

not resting on constitutional grounds, recognize "the important speech and associational rights . . . involved in this effort by the NAACP Legal Defense and Educational Fund, Inc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination." 508 F.2d at 163. And the Third Circuit cited this Court's decisions in *United Transportation Union* v. *State Bar*, 401 U.S. 576 (1971), and *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963), recognizing the free speech and association rights involved in such litigation efforts. See also, *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. State Bar*, 377 U.S. 1 (1964), and *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217 (1967).

This Court's decisions also make it clear that plaintiffs' counsel are not stripped of all First Amendment rights simply because they are attorneys before the bar of the court. *Brotherhood of Railroad Trainmen, supra*, 377 U.S. 1, 8. And as the court below put it, "the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." 508 F.2d at 163. An unbroken line of cases from *Bridges* v. *California*, 314 U.S. 252, 268 (1941), and including *Craig* v. *Harney*, 331 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *In re Sawyer*, 360 U.S. 622 (1959); and *Wood* v. *Georgia*, 370 U.S. 375, 384, 393 (1962), dispels any notion that lawyers are without free speech rights to talk about pending cases. To justify punishment (let alone prior restraint), there must be "an imminent, not merely a likely, threat to the administration of justice." *Craig* v. *Harney*, 331 U.S. 367, 376; *cf. Eaton* v. *City of Tulsa*, 415 U.S. 697, 698 (1974).

Of course, on the facts of this case, there is no question about any allegedly improper or punishable conduct by

plaintiffs' counsel. They have obeyed the district court's prohibition against communication and there is not the slightest suggestion in the record that they engaged in any solicitation or communication in violation of the court rules and orders. Thus, the case does involve the power of a court to punish disobedience of its orders or allegedly improper speech or conduct. Rather, the case involves the validity of a broad prior restraint. This Court has set forth, now well established principles disfavoring prior restraints in the area of First Amendment freedoms. *Southeast Promotions Ltd.* v. *Conrad*, —— U.S. ——, 43 L.Ed.2d 448, 459-460 (1975); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Carroll* v. *Princess Ann County*, 393 U.S. 175, 181 (1968); *Bantam Books* v. *Sullivan*, 372 U.S. 58, 70 (1963).

The prior restraint system set up by the trial court is fatally overbroad in its sweeping restraint on entirely lawful communications. It has become axiomatic that "precision of regulation must the touchstone in an area so closely touching our most precious freedoms," *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438 (1963). By establishing a prior restraint sweeping far beyond any legitimate concern of the court in regulating the conduct of class actions, the district court's rule and orders limited First Amendment freedoms in a fashion far more sweeping than could be justified by any governmental interest involved. *N.A.A.C.P.* v. *Button, supra.*

4. The trial court's rules and orders interfered with free access to counsel.

Freedom of association includes a right to privacy of association. The district court's requirements that every contact between plaintiffs' counsel and members of the class be disclosed prevents class members from consulting

with or assisting plaintiffs' lawyers in private and makes their every contact known to their employers. These rules invade the traditional attorney-client privacy. Little imagination is required to perceive that many a potential client or informant would be loath to approach counsel by running the gauntlet imposed by the trial court's orders. "Freedom [of speech, press and association] are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference," *Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Gibson* v. *Florida Legislative Investigative Committee*, 372 U.S. 539 (1963).

When black steelworkers seek to consult plaintiffs' attorneys they seek to exercise "the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 7 (1964). As the Court said in that case, "laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counselled adversaries, . . ." (*ibid.*). Indeed, the right to be heard by counsel of one's own choice has been called "unqualified." *Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954). See also, *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), where the Court said that an arbitrary refusal to hear a party by counsel would be a denial of due process "in any case, civil or criminal." And see, *Procunier* v. *Martinez*, 416 U.S. 296 (1974), condemning unjustified restrictions on prisoners' access to legal assistants and law students employed by counsel.

5. The restraint on communications was censorial and discriminatory.

The district court's restraint on communications was one-sided and unfair in its impact upon the efforts of black workers to oppose the defendant company and union. Defense counsel were entirely free to consult with their clients in respect to any matters relevant to the conduct of the lawsuit. The company and union have virtually limitless opportunity to communicate with black steelworkers in the regular course of business, and in the conduct of union affairs. Beyond that, the defendants had judicial sanction to explain the meaning of the consent decrees, and at a later date to offer back pay and solicit the workers release of their Title VII claims. "Implementation Committees" composed of company and union representatives met with workers to explain the Alabama consent decree.

In this context, the district court entered orders with the avowed purpose to prevent plaintiffs' attorneys from discussing the consent decrees with class members—even those who invited them to come to a civil rights organization meeting for this purpose. 508 F.2d at 158. This censorship of plaintiffs' speech unfairly disadvantaged those workers who sought to oppose the consent decrees, and gave an undue advantage to the defendants who sought to defend that decree and interpose it as a defense to the *Rodgers* suit. (For a similar case where U. S. Steel has sought to use the consent decrees to defeat a previously filed Title VII suit, see *Dickerson* v. *United States Steel Co.*, 64 F.R.D. 351, 360 (E.D. Pa. 1974), appeal quashed 9 E.P.D. 10063 (3d Cir. 1975), *cert. denied*, —— U.S. ——, 44 L.Ed.2d 102 (1975).) The district court's rulings constituted an invidious discrimination which allowed the defendants to voice their views with the workers by meet-

ings and by written communications while the plaintiffs were totally restrained from speaking.

6. The court of appeals carefully delimited its ruling to avoid broad issues involving other types of regulations which might be imposed in other cases or by other rules of court.

There is no conflict of circuits on the questions presented here because no other court of appeals has decided similar issues. Indeed, insofar as our research has discovered, no court has adopted a local rule as broad and sweeping as Local Rule 34(d). Our research has located only five other federal districts which have any rule regulating communication in class actions.[2] It is quite clear that Local Rule 34(d) is uniquely restrictive even among the small number of related federal court rules. Four of the rules partially codified Suggested Local Rule No. 7 in the *Manual for Complex Litigation*, 1 Moore Fedral Practice (par. 72, 1973). These rules specifically enumerate kinds of communication the rule is supposed to cover and contain exceptions not present in Rule 34(d).

Petitioners have attempted to defend Local Rule 34(d) by citation of the *Manual*. Actually the *Manual* quite explicitly disavows any such permanent or absolute prohibition of contact with class members, *Manual* § 1.41:

> The recommended preventive action, whether by local rule or order, is not intended to be either a permanent or an absolute prohibition of contact with actual or potential class members. Promptly after the entry of the recommended order, or the applicable date of the local rule in a case, and at all times there-

[2] Local Rule 19B, S.D. Florida; Local Civil Rule 22, N.D. Illinois; Local Rule 6, S.D. Texas; Local Rule C.R. 23(g) W.D. Washington; Local Rule 20, D. Maryland.

> after, the court should, upon request, schedule a hearing at which time application for relaxation of the order and proposed communications with class members may be presented to the court. Since the recommended rule and order are designed to prevent only potential abuse of the class action and are not meant to thwart normal and ethically proper processing of a case, the court should freely consider proposed communications which will not constitute abuse of the class action. In many such cases, the class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process.
>
> There will normally be some need for counsel to communicate with class members on such routine matters as answering factual inquiries and developing factual matters in preparation for the class action determination as well as for trial. In order that there might be some minimal judicial control of these communications, it is suggested that *ex parte* leave may be given by the court. If requesting counsel is at a distance from the court, the request may be handled by telephone.

No such cautionary note is present in Local Rule 34(d). This fact is underlined by the district court rulings that have exactly the unintended effect on the normal processing of this case.

The opinion below carefully refrained from ruling on the constitutional validity of suggested model provisions such as those in the Manual. 508 F.2d at 164-165.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1483

UNITED STATES STEEL CORPORATION,
Petitioner,

v.

JIMMIE L. RODGERS and JOHN A. TURNER,
Respondents,

HONORABLE HUBERT I. TEITELBAUM,
United States District Judge,
Nominal Respondent,

LOCAL 1397, AFL-CIO UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Nominal Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

As fully set forth in the "Petition,"[1] in this case a majority opinion of the Third Circuit has invalidated Local Rule 34(d) of the Western District of Pennsylvania, which Rule provided for court supervision of communication with potential members of the alleged class in suits brought under F.R.Civ.P. 23. The Third

1. "Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit" (hereinafter "Petition") at 9-12.

Circuit struck down that Local Rule on the grounds that federal courts lack the statutory power to regulate such communication, at least in the pre-certification stage of an alleged class action.[2]

The Respondents (who were the Plaintiffs in the District Court and are herein referred to as "Plaintiffs") have filed a "Brief In Opposition To Certiorari" (hereinafter also "Brief Opp. Cert.") which consists of (a) legal arguments, in support of the Third Circuit's opinion, that are essentially based upon grounds other than those adopted by the Third Circuit and (b) factual arguments as to why Plaintiffs should have been permitted to communicate by the District Court on the facts of the instant case.

In all, Plaintiffs set forth six separate arguments urging denial of the Petition. Brief Opp. Cert. at 12-21. One of Plaintiffs' arguments is that the District Court's rulings conflicted with Title VII of the Civil Rights Act of 1964. Brief Opp. Cert. at 15. Two of Plaintiffs' arguments are based upon First Amendment considerations. Brief Opp. Cert. at 15-18. An additional argument is that Local Rule 34(d) is in conflict with F.R.Civ.P. 23. Brief Opp. Cert. 12-15. Plaintiffs last two arguments relate to the facts and circumstances of this case. Brief Opp. Cert. at 19-21. As will be discussed, *infra,* none of these arguments provide a basis for denial of the Petition.

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2. *Id.*

A. The Third Circuit's Opinion Was Not Dependent Upon The Fact That This Is A Title VII Suit.

Plaintiffs' argument regarding the policies of Title VII is, of course, not a basis for denial of this Petition, because the Third Circuit's opinion was in no way limited to class actions pursuant to Title VII.

B. The Constitutional Issues Raised By Respondents Were Not Ruled Upon By The Third Circuit And Would Require Briefing And Argument On The Merits Before Resolution By This Court.

Plaintiffs' arguments based upon the First Amendment should not provide a basis for this Court's denial of the Petition. The Third Circuit's opinion explicitly disavowed ruling upon the constitutional issues.[3] Further, as the very cases cited by Plaintiffs indicate,[4] the First Amendment is not an absolute bar to supervision of communications even in cases where the communications do not have an effect upon the judicial process such as is present here. Even in those cases where no effect upon the judicial process is involved, the resolution of First Amendment issues involves many very sophisticated judgments as well as a careful delineation of the scope of permissible regulation.[5] Since the Third Circuit did not rule upon these questions, we presume that this Court would not decide such constitutional matters without the full briefing and assistance of the parties on the merits, regarding the extent, if any, to which the First Amendment precludes court regulation

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3. Petition at 15, and App. A, at 22a, 23a, 28a n.18.

4. *E.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975).

5. *Id.*

of communications which would bear upon the class action process created by F.R.Civ.P. 23.[6]

In addition, it should be noted that the existence of First Amendment rights in this case is far from clear. The communications which Plaintiffs and their counsel desire to make to the potential members of the alleged Plaintiff class arise only by reason of the stature of Plaintiffs and their counsel created by F.R.Civ.P. 23. Accordingly, the federal courts should have the power to regulate Plaintiffs' and their counsel's use of that stature. Further, any regulation of speech involved herein operates under and by reason of "judicial superintendence"[7] not from a bureaucratic official acting as a censor, and accordingly allows for prompt judicial consideration of the competing interests of freedom of expression and prevention of abuse of the judicial process.[8]

Moreover, even if there were some constitutional invalidity with the present language of Local Rule 34(d), an opinion defining the scope of that invalidity, if any, would be vastly different than the opinion of the

---

6. Petition at 24-27 discusses the numerous cases and authorities which have indicated that the First Amendment does not bar the courts from regulating communications where such regulation is needed to prevent abuse of the judicial process.

7. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963). The decision in *Sullivan* did not involve a court's additional powers to regulate communications which affect the judicial process.

8. In the instant case, the District Court promptly set hearings upon each request for communication made by Plaintiffs. Plaintiffs have not complained of the District Court's speed in granting such hearings, even though Plaintiffs have been dissatisfied with the Court's rulings upon certain of those requests.

Third Circuit which holds that the district courts lack all statutory power to regulate communications by attorneys with potential members of their alleged class, at least during the pre-certification stage of the suit. Therefore, even if the Court has some concern as to the constitutional issues raised in Plaintiffs' "Brief In Opposition To Certiorari," the appropriate course would be the grant of this Petition to settle these constitutional issues rather than to let stand a Third Circuit decision which does not decide them.

C. Neither Precedent Nor Logic Demonstrate Any Conflict Between Local Rule 34(d) And F.R.Civ.P.23.

Plaintiffs contend that Local Rule 34(d) is in conflict with F.R.Civ.P. 23. Brief Opp. Cert. 12-15. Plaintiffs cite no authority in support of that proposition other than the bare conclusion to that effect reflected in the majority opinion of the Third Circuit. The concurring opinion of Judge Weis disagreed with the majority and found that the regulation of class communications was not improper, although he would have required Local Rule 34(d) to be re-drafted to eliminate any overbreadth. If the majority opinion of the Third Circuit is permitted to stand, district courts in that Circuit will not be able to regulate communications by counsel with potential members of the alleged class, at least in the pre-certification stage of the suit—although in the other Circuits of the federal judicial system such power is both available and useful. Plaintiffs have offered no counter to the numerous cases cited in Petition at 18-21 which have recognized a district court's power to regulate class action communications. Plaintiffs have similarly offered no response to the discussion in the Petition at 21-23 of a recent congressional study and

the views of the Coordinating Committee for Multiple Litigation, which drafted the MANUAL FOR COMPLEX LITIGATION,[9] both of which acknowledge a district court's power under F.R.Civ.P. 23 to control such communications with potential class members.

The apparent premise of the Third Circuit's opinion is that there is not sufficient need to supervise communications with potential class members. A recent opinion of the United States Court of Appeals for the Fifth Circuit demonstrates both (a) the need for judicial supervision of class communications and (b) that, in fact, there was good reason for the Western District of Pennsylvania to seek to supervise the nature of the communications by these very counsel for Plaintiffs regarding the comparative injunctive relief and back pay available under the steel industry Consent Decrees[10] as opposed to that available in this *Rodgers* suit. The same attorneys, who here represent the Plaintiffs, argued to the Fifth Circuit, which was reviewing the Consent Decrees, that the amount of back pay and other relief available under the Consent Decrees was inadequate in comparison to the relief available to employees by way of contested litigation. In support of that argument, these attorneys discussed the recovery in the one action in the basic steel industry where back pay claims had been litigated and awarded (United States Steel Corporation's Fairfield Works case). The Fifth Circuit's opinion noted that the argument of counsel for Plaintiffs was "mislead-

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9. 1 J. MOORE, FEDERAL PRACTICE (Part 2, 1973).

10. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 11 BNA FEP CAS. 167 (5th Cir. 1975).

ing" as to the nature of the Fairfield Works recovery.[11] The Fifth Circuit pointed out that the average award per claimant in the Fairfield case was actually $440 per claimant less than that available under the Consent Decrees—not the great sums suggested by the counsel for Plaintiffs. The Fifth Circuit noted how counsel for Plaintiffs had omitted mention of the fact that while 60 Fairfield Works employees recovered damages, 3,000 other employees were held not entitled to any back pay. The Fifth Circuit further commented upon Plaintiffs' (there the Appellants') arguments:

> "Without saying more about the Fairfield case, we may candidly observe that it is far from clear that any particular employee would be better off if he or she awaited contested litigation in lieu of accepting the back pay provided by the consent decrees. If the decrees were vacated, however, it *is* clear that litigation-free back pay would be lost to those whose claims were factually weak and, though arguably entitled to some back pay, probably could not otherwise recover. *See* F.R.Civ.P. 52(a) (findings made by a district judge may not be disturbed unless 'clearly erroneous'). In addition, the immediate industry-wide injunctive reforms—which benefit 60,000 minority and female steelworkers—would likely evaporate, at least until after years of trials and appeals. Absent a much stronger showing than this, it would plainly be irresponsible for us to assume that the vast majority of affected employees would be persuaded by appellants' gratui-

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11. The Fifth Circuit stated: "Moreover, to the extent appellants contend that the average claimant's recovery in Fairfield exceeded the average award under the consent decrees, their argument is misleading." 517 F.2d 863, 11 BNA FEP Cas. 196.

tous advice, or that such advice is rendered in those employees' best interests." (Footnote omitted) 517 F.2d 863, 11 BNA FEP CAS. 196-197.

If the counsel for Plaintiffs will present to the Fifth Circuit figures concerning potential recovery in private class actions which that Court categorized as "misleading," should not the Western District of Pennsylvania have the power to oversee these same counsel's representations to the potential members of the alleged *Rodgers* class at the Homestead Works? The members of the alleged *Rodgers* class may not be as discerning as the Fifth Circuit in determining the facts which these counsel omit.

D. The Facts Of This Case Do Not Provide A Basis For Denial Of The Petition Because (i) The District Court Did Not Act Unfairly To Plaintiffs, And (ii) The Third Circuit's Holding Was Not Dependent Upon The Facts Of This Case.

There are numerous representations of fact in the "Brief In Opposition To Certiorari" which might be misleading to this Court. Plaintiffs suggest that the Defendants in this case have been free to communicate with potential class members and have solicited releases of class members' claims pursuant to the Consent Decrees, while Plaintiffs were precluded from all communications. Brief Opp. Cert. at 19. Nothing could be further from the truth. As discussed in the Petition at 7-8, in response to a motion by these Plaintiffs invoking Local Rule 34(d), the Defendants agreed to submit to the Plaintiffs and the Western District of Pennsylvania communications to be made pursuant to the Consent Decrees, before those communications were made to members of the alleged *Rodgers* class. Accordingly, not only

the Northern District of Alabama, but the Western District of Pennsylvania and counsel for these Plaintiffs have reviewed notices required by the Consent Decrees to be sent to potential members of the alleged class in this case. Further, Plaintiffs are well aware of Directive No. 4 of the Audit and Review Committee established under the Consent Decrees,[12] which prohibited the Implementation Committees created by the Decrees from discussing the subjects of back pay or releases under the Consent Decrees except to say that the individual amounts of back pay were in the process of being computed and that employees eligible to receive back pay would receive a separate notice, when the back pay is to be offered, which will provide all information necessary to enable employees to make an informed decision concerning its acceptance. Directive No. 4 prohibited the Implementation Committees from making any other statements regarding back pay or the releases.

Because of the prior pendency of the appeal to the Fifth Circuit, Defendant Company and Defendant Union to this date have neither made distribution of back pay under the Consent Decrees nor made available releases to back pay recipients. As discussed above, when those distributions of back pay are made, the Northern District of Alabama and the Western District of Pennsylvania will be exercising supervision over the communications to potential members of the alleged *Rodgers* class.

Plaintiffs give the impression that they were precluded for three years from communicating with poten-

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12. Plaintiffs included Directive No. 4 in "Appendix To Appellants' Brief" at 276aa, which was filed with the Third Circuit.

tial members of the alleged class. Brief Opp. Cert. at 1. However, Plaintiffs did not even seek permission to communicate with potential members of the alleged class until two years after the suit was filed. Brief Opp. Cert. at 4. Further, contrary to the impression one gets from reading Brief Opp. Cert. at 19-20, the District Court did not totally preclude all communications by Plaintiffs. When Plaintiffs sought the opportunity to communicate in September 1973, they claimed to need such communication for discovery purposes to determine from potential members of the alleged class the "seniority policies" and "testing policies" at the Homestead Works. Petition, App. D, at 38a. The District Court was properly doubtful as to Plaintiffs' intentions, since the Company had spent 2,000 hours searching out and copying the documents which explained those very practices and Plaintiffs had spent only two hours inspecting those documents. Petition, App. D, at 38a-40a. Nevertheless, the District Court did not foreclose the contacts by Plaintiffs with potential class members for discovery purposes. The District Court stated:

> "As to discussion with individual members of the class, if you will notify the defendants in advance whom you intend to contact in the class and what you intend to ask them, and what you think you can get from them, then I will permit you to contact them for the limited purposes that you have set forth, giving the right to the defendant to object to your contacting any particular member of the class, because it seems to me that this is absolutely going to be an exercise in futility when you go to an employee of the United States Steel Corporation and ask him what testing means were used

> in 1962. I can't conceive of him knowing, and I think it would be a waste of time." Petition, App. D, at 40a.

Strangely, Plaintiffs never specified any individual whom they wished to contact for discovery purposes, and never took advantage of the opportunity for a court order authorizing contact with particular class members.

Further, the District Court later ruled that when individual class members contacted Plaintiffs' counsel, said counsel could communicate with those potential class members, after an appropriate affidavit was filed verifying the absence of solicitation. Petition at 8-9.

Accordingly, Local Rule 34(d) was not an absolute bar to communication with potential members of the alleged Plaintiff class, contrary to Plaintiffs' representation of the facts.

Even more importantly, the Third Circuit's holding was not a ruling upon the District Court's application of Local Rule 34(d) to these parties or the District Court's exercise of discretion under that Rule. The Third Circuit's opinion was not dependent upon the wisdom of the particular rulings of the District Court, but instead invalidated the entire Local Rule. The Third Circuit has not only prohibited any further application of Local Rule 34(d) in this case, but has held that district courts lack the statutory power to promulgate rules supervising communications by counsel with potential members of their alleged class, at least prior to certification of the suit as a class action.[13]

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13. The Brief Opp. Cert. at 20-21 suggests that the majority opinion was limited to the particular language of Local Rule 34. However, that opinion makes clear that its holding of a lack of statutory power included even Suggested Local Rule No. 7 in the MANUAL FOR COMPLEX

Conclusion

Accordingly, the arguments set forth in Plaintiffs' "Brief In Opposition To Certiorari" do not provide a basis for denial of the Petition. This case is an important one. The Third Circuit's decision affects all class action litigants. For the reasons set forth in the Petition and in this Memorandum, we request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: September 23, 1975

LITIGATION, which Plaintiffs characterize (Brief Opp. Cert. at 20) as less "restrictive" than Local Rule 34(d). The majority opinion stated that the draftsmen of Suggested Local Rule No. 7 had "no power to enlarge the statutory rule making authority of the district courts." Petition, App. A, at 27a. The majority avoided ruling (Petition, App. A at 22a, 28a n. 18) upon the possible constitutional overbreadth issues presented by a comparison of Local Rule 34(d) and Suggested Local Rule No. 7—issues which are still open because the majority opinion does not explicitly prohibit adoption of such rules regarding the post-certification stage.